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# FROM GUTENBERG TO TELIDON

## A WHITE PAPER ON COPYRIGHT

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# FROM GUTENBERG TO TELIDON

A W H I T E P A P E R O N C O P Y R I G H T

(4)

## PROPOSALS FOR THE REVISION OF THE CANADIAN COPYRIGHT ACT

THE HONOURABLE JUDY EROLA  
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Government of Canada

Consumer and  
Corporate Affairs Canada

Government of Canada  
Department of Communications

Gouvernement du Canada

Consommation  
et Corporations Canada

Gouvernement du Canada  
Ministère des Communications



En français: De Gutenberg à Télidon  
Livre blanc sur le droit d'auteur:  
propositions en vue de la révision de  
la loi canadienne sur le droit d'auteur

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## PREFACE

It is now 60 years since the last revision of Canada's Copyright Act. The intervening years have witnessed the advent of radio, television, photocopiers, computers, satellites and a host of information storage and retrieval devices which have since become common instruments for the use and exploitation of intellectual property. The pace of introduction of these devices has quickened at an almost exponential rate since 1924 and may be expected to continue to do so.

Technological change has fundamentally altered the context and assumptions of many of our laws and institutions. Not least among these, it has altered the relationship between creators and the users of their works. Nevertheless, the right of creators to control the use of their works and the right of users to fair access will always be a fundamental tension in copyright protection.

The issues raised by revision of the Copyright Act link two of the major policy concerns of the Government of Canada. One is the government's commitment to assuring a climate in which creativity can flourish, to the ultimate benefit of us all, and the second is the government's determination to help Canadians benefit as much as possible from technological change.

Both of these were among the five goals announced in the recent Speech from the Throne, and one of the actions promised was the introduction in this Session of Parliament of revisions to Canada's Copyright Act. This document represents the first step in fulfilling that commitment.

The proposals presented here represent widespread consultation over a period of years, both within government and with the public, and are of two sorts: those for which Cabinet approval has been given to draft legislation, and those for which final decisions have yet to be taken.

The comments of the public are now being sought on both categories of issues but especially on those where decisions have not yet been taken. Two of these important issues are analysed in detail in appendices to the main text. They are:

- the question of liability for cable and satellite retransmissions of broadcasts containing copyright works;

- determination of ownership of copyright in employment situations.

It is also felt that further input from interested parties is required before final positions are taken on specific issues, which include:

- the length of time for which exempted ephemeral recordings can be retained;
- any continuing exemption or other special treatment for jukebox performances;
- the details of an exemption for certain performances in public establishments;
- droit de suite.

This White Paper has been prepared jointly by the Department of Consumer and Corporate Affairs and the Department of Communications and is being issued at this time to assure interested parties the maximum opportunity to comment. It will be referred to the Parliamentary Standing Committee on Communications and Culture for review and consideration. Briefs and submissions may be directed to: The Clerk of the Committee, Room 516, 180 Wellington Street, Ottawa, Ontario, K1A 0A6.



The Honourable Judy Erola

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The Honourable Francis Fox

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## INTRODUCTION

Copyright in Canada is the legal recognition of the exclusive right of a creator to determine the use of a work and to share in the benefits produced by that use. Originally concerned with printed material, it now extends to other works and activities. Copyright legislation is intended to reinforce the general principle of protecting the results of creative effort in the social and technological context in which it must be applied. In addition to the pecuniary benefits, creators are entitled to certain "moral" rights that enable them to protect their reputations and prevent any distortion or mutilation of their works.

Technological change has fundamentally altered the relationship between creators and users of their works. Consequently, throughout the revision process, the government has given particular consideration to producing a revised Act that strikes a fair balance between creators and users. In general, given strong and competitive markets, the new Act will achieve this balance by setting out clear definitions of the property rights of creators. There should then be no need for the government to intervene in individual transactions in determining how much remuneration creators should receive, or how their works should be made available to the public.

The social and technological context in 1984 is vastly different from that in which Canada's present legislation was drafted. Not only have whole new technologies emerged requiring specific measures of their own, but the value and importance of the economic sector dependent on copyright materials is and will continue to be one of the major growth areas in our society. The social and cultural as well as economic interests of Canadians served by the press, the electronic media, the entertainment industries, and a host of other services are based on the individual efforts of creators.

The collective worth of Canadian industries relying on copyright to provide their basic legal infrastructure is approximately \$8 billion. This is equivalent to 2.2 per cent of the Gross Domestic Product. Actual copyright payments within these industries total more than \$1 billion, with 67 per cent paid to Canadian sources and 33 per cent paid to non-Canadian sources. It should be noted, however, that the radio and television broadcasting industry accounts for 75 per cent of total payments, with 82 per cent of payments in that industry going to Canadian sources. Within industries such as the publishing, recording and film

industries, just 22 per cent of payments go to Canadian sources while the remaining 78 per cent is paid to foreign rights owners.

The importance of the work of the individual creator will continue to grow as our society moves ahead into the information age. This age will be characterized by access to copyright works unimagined when present legislation came into force and by an increasingly international commerce in those works.

It is therefore not only timely but urgent and necessary that Canada's Copyright Act be revised to meet the challenges of the new environment, for today and for the future.

This paper contains a large number of proposed changes on which decisions have been reached and which are presently being drafted into legislative form.

In some cases, these changes represent alterations to existing elements of the Act, based on current policy. For instance, experience has shown that organized societies for the enforcement of rights and the collection of fees have proven very useful in those cases where it is impractical for copyright owners to negotiate individually with users, as in the use of music by radio stations. There are clearly other instances in which creators could benefit from such societies and their formation is to be encouraged. Obviously, this would require a greater role for a revised Copyright Appeal Board, and this White Paper contains proposals to accomplish this.

For proposals such as the above, a high level of acceptance from everyone concerned is anticipated. In such instances, the solicitation of views from the public is intended to act as a final check that the new legislation will in fact produce the effects intended.

There are other cases in which revision to the Act involves the introduction of new elements; most of these, although by no means all, relate to new technologies.

For example, the new Act proposes to grant computer programs a specialized form of protection, and clarifies the ownership of various rights in works such as motion pictures, which involve the input of many different collaborators. A change not related to technology is the proposal to explicitly vest creators with strengthened moral rights to prevent distortion and mutilation of their works.

Changes of this kind, while new, have the intention of regulating in a uniform fashion concepts and practices for which there is widespread support and which are already frequently recognized through contractual arrangements.

Input from the public on these matters should confirm that the form in which the legislation appears is workable and just.

There remains a third category of possible changes which poses significant practical, economic and ethical problems. Chief among these is the widespread public use of copyright material through retransmission by cable or satellite of works for which no compensation is presently being paid to copyright holders.

On this matter and on certain others detailed in the White Paper, the government is seeking specific public input before taking a final position.

Whatever the final forms of specific protection granted in the revised Act, the necessary corollary will be revision to the remedies available for unauthorized use. The deterrent effect of the present low level of fines provided in the Summary Remedies of the Act is inadequate and must be increased.

While it is a matter of urgency and a priority of the government that the Copyright Act be revised, the limits of new legislation must be recognized. As the Report of the Federal Cultural Policy Review Committee stated:

Nobody should be under the delusion that copyright legislation, by itself, will solve either the economic or social problems of all authors. Copyright legislation serves best those authors whose works appeal to large segments of the public, wherever in the world they may be. It cannot solve the social and economic problems of those authors whose works, although they may have great aesthetic or academic value, will earn very little because they appeal to relatively small numbers of users.

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1. Report of the Federal Cultural Policy Review Committee, 1982, p. 98.

Copyright remains, however, the basic protection of all creators and the cornerstone of our cultural, entertainment and information industries. As such, its importance to both the cultural and economic life of the country is considerable, and it merits a legislative instrument equal to the legitimate demands placed upon it.

In addition, it must be remembered that copyright belongs to a family of intellectual property statutes - the others being patents, trademarks and industrial designs. Since they all involve international agreements in which Canada participates, Canadian copyright policy must take into account Canada's international obligations.

Canada adheres to the two major international copyright conventions: the Rome Text (1928) of the Berne Convention and the Geneva Text (1952) of the Universal Copyright Convention (UCC). The major underlying principle of both is that of "national treatment": whatever copyright protection is afforded to Canadian nationals must also be afforded to nationals of other member countries.

All of Canada's major trading partners belong to one or both of the major copyright conventions. Since Canadian creators receive national treatment protection in these countries, they benefit from Canada's participation in these conventions. The government intends that Canada's international obligations be met in the spirit as well as in the letter of the law. Since some sectors are dominated by foreign products, the national treatment requirement constrains our freedom to stimulate Canadian activity via copyright provisions alone.

For most Canadians, "copyright" will never be a household word. Yet, it vitally affects many activities within the community that are of immense importance and interest in a developed society. These include the press, radio, television, computers, cable television and satellites, the recording industry, film, theatre, home entertainment, books, magazines, architecture, and music. The government believes that the revisions outlined in this White Paper will greatly benefit the many Canadians whose lives are affected, directly or indirectly, by copyright.

## Section I

### CRITERIA FOR COPYRIGHT PROTECTION

Copyright protection in Canada arises automatically without formalities. There are, however, some basic criteria required in relation to either the work created or the person creating the work. These criteria include the concepts of originality and fixation, the place of publication of the work, and the nationality of the author. Throughout this document the words "author" and "creator" are used interchangeably to refer to the creator of a work. This terminology is standard in the copyright conventions and laws.

The government does not intend to change the substance of these criteria, which are generally known and understood; it intends only to codify them in a clear manner and to ensure that they encompass new technological developments.

#### Originality

The Copyright Act requires a work to be original if it is to receive protection. "Originality" in this sense does not refer to originality in thought, since copyright is not intended to protect ideas. The originality requirement refers to originality in expression and independence of effort. Reduced to basic terms, "original" simply means that the work has not been copied. Others are at liberty to produce a similar or identical work provided they do so independently. The government believes that this basic concept of originality, which has been defined by Canadian case law, is an appropriate one, and that no change is required.

#### Fixation

Although the requirement that a work be "fixed" in material form is not expressly set out as a general criterion in the Copyright Act, the courts have considered it necessary because it is difficult to prove the existence of an unfixed work. Certain difficulties do, however, arise with this aspect of the present law. For example, the definition of musical works limits protection to those that are written or printed for visual perception. The advent of the sound recording, which provides an alternative means of fixing these works, makes the present definition unnecessarily constraining.

A second problem arises with regard to lectures, speeches, addresses and sermons delivered without notes. Presently, these works might only be given protection when fixed in writing prior to presentation.

A third instance of possible loss of protection arises where works of sounds, images, or both are transmitted by broadcast or cable without being fixed prior to transmission.

To avoid these and similar problems, fixation will continue to be a requirement for protection but the definition of fixation will include any means capable of capturing the work, whether written and notational formats or audio and video recording, including the simultaneous recording of a work transmitted by broadcast or direct cable transmission.

#### Nationality and Place of Publication

The present Copyright Act provides protection for the works of an author who is a Canadian citizen or a British subject, or a citizen of a foreign country that has adhered to the Berne Convention or who is resident within the Commonwealth, and in the case of a published work, if the work was first published within the Commonwealth or in such foreign country. In addition, protection can be extended to other countries that grant protection to Canadian citizens but are not members of the Berne Union. In this manner nationals of UCC country members that do not adhere to Berne (e.g. the U.S.A.) are given protection.

The requirements of the Berne and the Universal Copyright Conventions oblige Canada to go further than the present law, in order to protect works of creators of convention countries regardless of the country of first publication of the work and works of non-convention nationals first published in a convention country. In addition, equity dictates that all works created while an author was domiciled or resident in Canada should receive protection.

Since copyright can also be held by corporations and similar legal entities, the Act for reasons of clarity will specifically set out which entities qualify for protection. To meet all these requirements, the Copyright Act will protect the works of the following "qualified persons."

Individuals:

- Canadian nationals
- those domiciled or resident in Canada
- non-nationals whose works require protection under the conventions to which Canada adheres
- nationals of those countries to which the Copyright Act may be extended from time to time

Juridical persons:

- bodies incorporated in Canada
- bodies incorporated in countries signatory to the conventions to which Canada adheres
- bodies incorporated in countries to which the Act may extend from time to time
- organizations to be named from time to time by Order in Council (e.g. the United Nations)

Works of joint authorship will be protected as long as one of the authors qualifies for such protection.



## Section II

### SUBJECT MATTER OF COPYRIGHT PROTECTION

Section 4 of the present Act provides that copyright is to subsist in "every original literary, dramatic, musical and artistic work...." This expression is defined in section 2 of the Act to include "every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression such as...;" this is followed by an illustrative list of specific works such as books or lectures.

The Copyright Act also provides protection to sound recordings, which are treated as musical, literary or dramatic works, and to cinematographic productions, which are included as either dramatic or artistic works.

In addition to works presently protected, other subjects being considered for protection include computer programs, computerized information storage and retrieval systems, performers' performances, broadcasts, editions, blank forms and industrial designs.

#### Literary, Dramatic, Musical and Artistic Works

The Act contains separate definitions of each of the four categories of literary, dramatic, musical and artistic works. Thus, a literary work is defined to include maps, charts, plans, tables and compilations. A dramatic work includes recitation pieces, choreography and films of original character. A musical work is defined to mean any combination of melody or harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced. Finally, an artistic work is defined to include works of painting, drawing, sculpture and artistic craftsmanship, architectural works of art and engravings and photographs.

To ensure that the revised Copyright Act includes new creations as well as new forms of expression of existing works, the Act will apply to original works defined in accordance with a generic phrase and classified into specific categories of works. Every work coming within the Copyright Act will be entitled to protection, regardless of the mode or form of its expression and of the means by which it may be reproduced, perceived or communicated.

As there is no overriding case to be made for changing these general categories, the four main classes will be retained, but sound recordings and cinematographic works will be treated as separate categories. In addition the new Act will be drafted in such a way as to ensure that choreography does not require a story line to be protected.

### Sound Recordings

Although the term "sound recordings" is not found in the present Copyright Act, the Act does provide that copyright subsists in records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced "in like manner as if such contrivances were musical, literary or dramatic works." Sound recordings will be protected in their own right as a separate class of works.

### Cinematographic Works

Copyright protection for film and videotape productions is now provided indirectly by treating such productions as either dramatic works or photographs, the latter being a type of artistic work. For clarity and certainty of protection, all cinematographic works will be protected as a single class of original works. The terms "cinematography" and "process analogous to cinematography" will be defined broadly to include any means by which such works are produced, irrespective of the technological process utilized (e.g. videotapes and videodiscs).

### Computerized Information Storage and Retrieval Systems\*

Computerized information storage and retrieval systems are now commonplace in all areas of business, government and education. Questions that have raised a great deal of interest and uncertainty, at both the national and international levels, concern the degree of impunity with which copyright material can be put into a computer, and the copyright status of data assembled or compiled for the first time on a computer.

In section 3(1) of the present Copyright Act, a copyright owner is given the sole right to "reproduce the work

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\* Note: This section does not apply to computer programs, which are dealt with in Section XII.

...in any material form." Thus, it is possible that unauthorized input into a computer constitutes an infringement of copyright. This section could thus be interpreted as extending copyright protection to reproduction in a computer just as reproduction in any other form is covered. The status of a "work" in a computer is less clear, however. It is unclear whether transforming computerized information from one format to another, e.g. from magnetic tape to read-only-memory, or making additional copies in the same format, constitutes copying within the meaning of the Copyright Act.

According to Canadian case law, reading data from a computer reproduced on a video display unit is not a reproduction since such a display is not a tangible copy of the work.

Copyright material will be protected regardless of the medium of its expression. Hard copies such as magnetic tapes and discs will be considered as copies, thus making unauthorized reproduction in these formats an infringement. Displays on video units, however, will not be considered copies.

Works originally created and fixed in a computer will qualify for copyright protection irrespective of whether they exist or are fixed in another medium.

Authorization to make reproductions or other protected uses of the copyright material will be required at the input stage.

#### Performers' Performances

The present Copyright Act does not provide performers with the right to control either the recording, or the reuse of their performances once they are recorded. At issue is whether performers should, in addition to their contractual rights, have statutory or property rights in their performances. The issue has arisen because of performers' complaints regarding their inability to deal with third parties who record and use performances without authorization.

Performers seek two forms of protection. The first is a means of proceeding against third parties for the unauthorized recording and use of their performances, such as through "bootleg" recordings of live performances that are then retailed. The second is a right to exact a fee for repeated use of performances that have been recorded with authorization. Such users would include radio broadcasters who play recorded music.

It is difficult to envisage a practical system permitting use of recorded performances if every performer in a performance could exert an individual copyright claim. Granting the right in this manner would require users to obtain the authorization of every performer for each reuse of a performance. Furthermore, these matters can be dealt with through private negotiation.

It is to be noted that Canada's international copyright obligations do not require the provision of such protection.

In view of the problems identified it has been decided that the unauthorized recording of performances for commercial gain or the use of such unauthorized recordings for that purpose will be made an offence. This will protect performers from those who seek to interfere with the legitimate business of providing public entertainment by means of records and tapes. However, performers will not be provided with a copyright in their performances.

### Broadcasts

Broadcasts are not protected subject matter in Canada. Material contained in broadcasts (films, for example) may be protected, but that protection attaches only to the material and not to the broadcast signal containing it.

When broadcasters transmit recorded programs, as is the usual case, and when they transmit works that are fixed at the time of the broadcast, copyright protection attaches to the particular recording as a sound recording or a cinematographic film but not to the broadcast itself. Unauthorized use of a protected work in the broadcast constitutes infringement.

The provision of a right in broadcasts could add an unnecessary layer of proprietary rights to already-protected material. Such an extension could complicate the exploitation of material, and add to negotiating costs of both owners and users. Although broadcasts are protected in a few other countries, the copyright conventions do not require Canada to provide this protection. For these reasons the new Act will not protect broadcasts.

### Editions

Under the present Copyright Act, the work embodied in an edition may be protected by copyright, so that copying requires the consent of the copyright owner. But the edi-

tion itself (including the typographical arrangement) is not protected, though it does benefit indirectly from the copyright protection given to the included material. If, however, the work embodied in the edition is in the public domain, there is nothing to prevent a competitor from copying the edition photographically or from resetting the unprotected edition, and thus benefitting from the expense and labour of the original publisher.

To eliminate that possibility, members of the publishing industry have proposed that copyright protection be extended to the edition itself, including the typographical arrangements, as opposed to only the content of the edition. In addition, they recommend that protection be extended to the new editions of works still protected by copyright. Publishers argue that advances in reproduction techniques have made it possible to reproduce works at lower unit costs than those involved in producing the original edition, so that this form of copying now needs to be controlled.

Copyright protection is granted on the basis of creative input in the production of certain categories of works. Editions as such do not fall within either the current or proposed categories of protected works to be included in the new Copyright Act. The activity involved in the publication of new editions may require protection against permitting one individual to be unjustly enriched by the labours of another.

In many cases, certain elements of an edition may be protected by copyright because they fall within existing categories of protected works. The art work on the cover, the table of contents, the foreword, editorial comment, marginal notes and other changes or additions to the work embodied in the edition can qualify for copyright protection. In such cases, these elements cannot be copied without authorization.

Thus, although the edition itself is not protected, it may be indirectly protected through its component parts. This protection falls squarely within the kind of creativity the copyright law is designed for, whereas protection of the edition itself or of a new edition does not.

Finally, Canada is not obliged to provide such protection by the copyright conventions. For these reasons, copyright will not be extended to cover new editions.

### Blank Forms

A recent trial-level decision by the Federal Court appears to greatly restrict the long-standing practice of the Canadian business forms industry to duplicate blank business forms. This practice has resulted in healthy competition and low costs to users.

The case in question granted copyright in business forms that consisted largely of grids or boxes into which information could be placed.

The great majority of the industry in Canada is in favour of denying copyright protection to this type of material. Unlike the cultural and entertainment industries, which have come to rely on copyright protection to ensure stability and growth, this industry has prospered in the past without such protection.

The government believes that protected works must convey a certain minimum amount of literary, pictorial or musical expression. Copyright will not be provided for names, titles and phrases or clauses such as column headings, simple checklists, and the like. The format, arrangement or typography of a blank form or similar work will not be eligible for copyright protection.

Consequently, the new Act will include a provision to the effect that no work primarily intended to receive information will be considered eligible for copyright protection simply by reason of the arrangement of labels or headings designating the type of information to be provided. Nor will any system or series of such works intended to be used together be considered to be a compilation for the purposes of attracting copyright protection.

### Industrial Designs

The boundary between copyright and industrial design protection is likely to be difficult to determine for "artistic works" defined in section 2 of the Copyright Act as including "works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs."

Section 46(1) of the current Copyright Act is intended to exclude from copyright protection designs that qualify for industrial design protection. This section is poten-

tially troublesome, however, since the only designs excluded are those that qualify for registration under the Industrial Design Act. Consequently, designs that are not protected (i.e. because their features are dictated solely by the functions being performed by the articles to which the designs are applied, or because they are not novel) could receive copyright protection.

The Department of Consumer and Corporate Affairs is in the process of drawing up recommendations for the revision of the Industrial Design Act. At that time, the Department will address the relationship between the Copyright Act and the Industrial Design Act and will make appropriate recommendations for delineating the boundary between these two forms of protection. In the interim, the present section 46 will be retained.



## **Section III**

### **RIGHTS ATTACHING TO SUBJECT MATTER**

Under Canadian copyright law, creators are provided with two different types of rights: economic and moral. These rights are generally exclusive in the sense that no one can use the work in the prescribed manner without the permission of the creator or subsequent copyright owner.

Economic rights attach to the various subject matters protected by copyright. They include the right to reproduce, perform in public, publish, adapt, broadcast and authorize each of the above.

Other economic rights have also been proposed by various interested parties and will be examined in this section. They include the public renting right, the public lending right, the performing and broadcasting rights in sound recordings, the "droit de suite," the right to exhibit artistic works, and the right to prohibit the importation of some categories of works.

Moral rights attach to the personality of creators and include the right to claim authorship and the right of integrity. These will be discussed after the analysis of the economic rights.

#### **Economic Rights**

The Copyright Act presently enumerates the rights of creators of literary, dramatic, musical and artistic works. The rights are not themselves defined, but are generally described by being attached to specific categories of works in section 3(1) of the Act.

To provide greater clarity, the various rights to which copyright owners are entitled will be explicitly defined.

The rights provided under the present Act will be regrouped into six broad rights: to reproduce, to perform in public, to publish, to adapt, to broadcast and to authorize such activities.

Reproduction. "The right to reproduce" means the right to copy a work or any substantial part of it in any material form, including a recording or a film. Recognition of copyright owners' sole right to reproduce their works by such diverse means as mechanical contrivances, motion picture films, or videotapes is an underlying principle of the Copyright Act. Furthermore, the new definition of the right will retain the words "any substantial part." What constitutes "any substantial part" is a question of fact to be determined by the courts based on the circumstances of each case.

Performance in public. Section 2 of the present Act defines performances as being

any acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication.

The meaning of the phrase "in public," in respect of a performance, has been frequently dealt with by the courts, and whether or not a performance is in public is considered a question of fact. For that reason, the phrase "in public" will not be defined in the new Act.

However, the word "performance" will be redefined to reflect technological developments, taking into account the different nature of various works. Thus, a public "performance" will include public delivery of lectures and similar works, the public presentation of a work that is broadcast, the playing in public of a record and the public exhibition of a film.

Public performance rights will not be granted to sound recordings for reasons that are discussed later in this section.

Publication. Under the present Act, the right to publish is not defined. However, "publication" is defined in section 3 as the "issue of copies to the public."

Publication currently affects the length of term, the extent and in some circumstances the existence of protection. Before publication, an author has absolute rights and control over the work, but once that work is published, protection is subject to exemptions and the term is limited in duration.

However, the decisions on the term of protection contained in Section VI of this White Paper include the establishment of a limited term of protection for unpublished works that would reduce the significance of whether a work is published or unpublished. It is also recommended that the revised fair dealing provision apply to both published and certain unpublished works. Since the distinction between published and unpublished works is to be reduced, the definition of publication becomes less important. The current concept of publication (requiring the issuance of copies to the public) will be retained and the right to publish will continue to be granted to copyright owners.

Adaptation. Under the present Act, the right to adapt is explicitly given only to traditional works being adapted to cinematography. However, the same principles apply to the right to convert a dramatic work into a non-dramatic work or vice versa, and the right to "produce, reproduce, perform or publish any translation of the work." The right to adapt will be defined to encompass all the above.

Broadcast, cable and satellite origination. The current law provides to copyright owners the sole right to communicate their works by radio communication. When this right was provided, radio communication was limited to terrestrial broadcasting. Today's works can be communicated to the public in a number of new ways, including cable origination, and cable and satellite retransmission. These communication methods fall into two broad categories: transmission and retransmission. Transmission refers to a communication of a work from one place to a number of persons. Retransmission refers to retransmitting the same signal by a different means.

Terrestrial broadcasting, cable origination, and primary transmissions from satellites are originating activities and therefore fall into the first category. Copyright owners will be provided with the necessary rights to control and exploit all such transmission activities. However, for reasons discussed later, sound recordings will not be granted a broadcast right.

Cable use of broadcast programming and certain activities of point-to-point satellites, which are retransmission activities, are discussed in Appendix I.

Authorization. Presently, it is an infringement to improperly authorize the exercise of any of a copyright owner's exclusive rights. This right will be retained.

Public renting. Under existing law, when a person buys a copy of a protected work, the buyer may rent the copy to others without the permission of the copyright owner, in the absence of any agreement to the contrary.

Owners of copyright in certain works such as films, videotapes, and sound recordings have argued for a new right to control the commercial renting of their works. Rental to the public is an increasing practice in the entertainment business where, instead of purchasing a copy of a record or film, the user rents a copy for a smaller amount. The operator of the rental establishment has made a profit, the consumer has paid less than the purchase cost for the record or film, and the copyright owner usually receives no compensation.

Copyright owners who receive revenues from the sale of records and films have found that a growing number of establishments rent copies without authorization, then keep the profits. The copyright owners, as the participants in the creation of these works, argue they should have the right to control the rental of copies. This would ensure compensation for an important new means of exploiting their works.

It is the rental market for both video and sound recordings that is of economic significance. Consequently, the new Act will provide a renting right that is limited to the commercial renting of sound recordings, films, and videotapes. The Act will also contain provisions allowing the Governor in Council to extend this right to other types of works.

An exclusive right to authorize the rental of particular works would allow copyright owners to negotiate agreements with rental businesses. In return for such authorization, the rental establishment could agree to pay the copyright owner a fee and to keep appropriate records of rental activities.

Consumers who purchase copies would have essentially the same rights as under existing law. For example, they could destroy the copy, loan it, retain it permanently, or give it as a gift. Public libraries could continue to lend audio or video recordings and make nominal charges to cover purchase and administrative costs.

The new renting right will apply only to commercial rentals of films, videotapes and sound recordings.

Public lending. A public lending right, usually associated with books loaned by libraries, but extendible to other material such as records or films, is generally viewed as a compensatory mechanism for lost sales caused by repeated loans, representing foregone royalties.

If an exclusive right to lend were adopted, Canada's international copyright treaty obligations would require payments to non-Canadian copyright owners. As there are many more foreign than Canadian owners, most of the royalties paid under such a scheme would flow out of the country. It is for this reason that of the twelve countries with a compensation scheme, only one has provided compensation by a direct copyright method. Thus Canadian copyright owners would not receive royalties in other countries even if Canada instituted this right. To avoid these negative effects, the copyright method of compensation will not be adopted.

Performing and broadcast rights in sound recordings. The new Act's protection for sound recordings will not include a right to collect a royalty for the public performance or broadcasting of sound recordings. Proponents of such rights argue that commercial enterprises should not be at liberty to use sound recordings without payment.

This right was provided in the Copyright Act until it was deleted by an amendment in 1971. The amendment was precipitated by an attempt on the part of record manufacturers to exercise the right for the first time. The government of the day took the position that the exercise of the right could only lead to an increase in payments to non-Canadians.

At that time, 90 per cent of records manufactured in Canada were from master recordings made outside the country. That percentage has not changed significantly. Moreover, no reciprocal benefit was or is seen as accruing to Canada, because many other countries do not provide a performing right in sound recordings. The international conventions by which Canada is bound do not require such a right.

Broadcasters argue that the playing of records represents unpaid advertising and promotion, resulting in stimulated sales of recordings. In their view, such sales properly compensate the record manufacturer.

Performing and broadcast rights in sound recordings will not be provided in the new Copyright Act.

Droit de suite. There is no droit de suite in the present Act. This right, if provided, would enable the creator of an original artistic work to share in the proceeds of its resale. In this manner an artist, and even possibly his or her heirs, could claim a share of increases in the value of a work of art as it was resold.

In most cases money received on a sale of the original is the only income that the artist will derive from that particular work. The droit de suite came into existence in Europe to allow artists to participate in resales of their works in much the same way as authors and composers receive royalties for reproduction and performance. In those relatively few jurisdictions that do grant the right, it applies only to works sold by public sales or auctions.

Artists favour the provision of a droit de suite. However, a droit de suite could depress the art market by lowering returns from sales as a result of the extra costs. Providing the right could also tend to move art sales to jurisdictions where no such right exists, or could result in sales being effected by private arrangements.

Aside from the practical and legal difficulties, and the ease of evading the right, there remains the difficulty of ensuring that the right would apply (in the absence of material reciprocity) only to Canadian creators. Under Canada's current international obligations if it were to provide the right, it would have to be provided to the nationals of the countries that are members of the two copyright conventions. Thus, the right would benefit foreign artists, without reciprocal benefits for Canadians from most foreign countries.

In considering this difficult question of whether to introduce the right, the government is of the opinion that the difficulties inherent in the effective exercise of such a right would outweigh the benefits which would accrue to visual artists. Nevertheless, the government would welcome further debate and public comment on the principle and the details of exercising such a right.

Exhibition right for artistic works. Such a right would enable artists to control the public exhibition of their work. The present Copyright Act does not provide this right. The argument has been made that the new Act allow artists to control public exhibitions of their works and collect royalties for these, not only with respect to unsold works but even after the sale of an original work.

Similar protection can already be provided by contract, although artists point out that with the new right they would obtain some leverage in bargaining.

However, any increase in bargaining power could be more than offset by the negative consequences of such a right. An outflow of royalties to foreign countries would result, as the right would have to be given universally because of Canada's international treaty obligations. The treaties do not, however, require such protection and as a result there would be no reciprocal inflow of royalties because many countries do not provide an exhibition right.

Payment for exhibition of artistic works will continue to be governed strictly by private contract and will not be required by the Copyright Act.

Prohibition of importation. A copyright owner's exclusive right to prevent the importation of competing foreign editions arises only through specific provisions in the Act.

Section 17(4) of the current Act protects a copyright holder in Canada against competition from any imported version of the work by deeming the unauthorized importation of such versions to be an infringement. Further, section 27 establishes the right of the copyright owner to enlist the assistance of Canadian customs officials to prevent the importation of such copies.

However, sections 28(3)(a),(b), and (c) limit the copyright owner's right to prevent competing foreign editions from entering Canada. This section allows importation for the following:

- individuals in respect of personal use
- the federal government and all provincial governments
- libraries and institutions of learning prior to the printing or making of a work in Canada

Sections 28(3)(d) and 28(4) further provide that it is lawful to import into Canada a foreign edition of any book by a Canadian author that has been lawfully printed in Great Britain or a foreign country adhering to the Berne Convention.

The issue is whether copyright owners should be able to divide their copyright territorially and thus control the distribution of their works across international boundaries, subsequent to the authorized publication of those works. In essence, there are two polar positions relating to the con-

cepts of complete "territorial divisibility" of copyright as opposed to complete "exhaustion."

"Territorial divisibility" requires the establishment of a comprehensive set of effectively enforced import prohibitions. Under this approach a copyright owner would be able to prevent the importation into Canada of competing authorized foreign editions of the work.

"Exhaustion" is based on the notion that, once a party has placed goods for sale in any market, the rights with respect to the distribution (by sale, rental or other means) of such goods, as opposed to the copyright therein, is exhausted. This would mean that importation of any edition or version of a copyright work would be permitted, as long as it had been produced with the consent of the copyright owner. Thus, there would be protection only against the importation of versions produced illegally in a country where the work was, in fact, protected by copyright, or produced in a country where no copyright exists. There would be no protection, however, against authorized foreign versions that had been introduced into the marketplace with the consent of the copyright owner.

In practical terms, this would force copyright owners to recognize the possibility that copies of foreign versions might be imported into Canada in competition with domestically produced copies.

The book publishing industry has, in the past, been the most concerned about, and the most vocal in its support for, the further strengthening of import protection provisions. The Economic Council of Canada's analysis of this issue focused solely on the book publishing industry, which would probably be the most heavily affected. Import restrictions on copyright-protected works do, however, affect such works as sound recordings, audio/video discs and tapes and computer games.

Copyright owners desire strict territorial divisibility because it allows them to sell their works separately in different national markets. To maximize their profits, they may find it optimal to maintain different prices in different markets.

In the government's view, import provisions should be directed towards industries that may require such protection to develop satisfactorily, it being recognized that such a restraint may diminish competition and result in higher prices to consumers. This situation exists in certain cultural and entertainment industries where book publishing,

music, sound recording and film industries may need to separate markets and deal with rights territorially.

Thus, books, records, the musical works contained in the records, and cinematographic works will be granted import protection under the new Copyright Act.

It is the policy of the government to support cultural industries. Therefore the Governor in Council will be given the necessary power to add, from time to time, by regulation, other types of cultural works to the list of those protected.

For non-cultural works such as computer programs, however, import prohibitions could create access problems for Canadian users without any real benefit. For such works as computer games, moreover, import protection would provide little benefit to Canadian industries since few of these games are produced in Canada.

Certain further changes will be made to the import provisions. Section 27 provides that copyright owners may enlist the support of customs officials in preventing the importation of copies of any works that would infringe their copyright if made in Canada. Revenue Canada has had great difficulty in distinguishing between infringing and non-infringing copies. If the provisions were enforced, customs officials would be required to check immense quantities of materials. In addition, the onus of pursuing infringers in this instance should properly lie with the copyright owner.

For these reasons, section 27 will be repealed.

However, subsections 28(3)(a), (b), and (c), which allow importation of copies of works in the instances previously cited, will be retained. The remainder of section 28 will be repealed.

#### Moral Rights

In addition to economic or property rights, authors enjoy certain moral rights associated with the personality of an author. In the present Copyright Act, an author is entitled to claim authorship and to preserve the integrity of the work by restraining any distortion, mutilation or other modification that is prejudicial to the author's honour or reputation. These rights are independent of an author's copyright and survive the assignment of copyright. However, they may be waived by an author.

There is no generally accepted definition of moral rights, as the scope and substance of such rights vary from one jurisdiction to another.

The two moral rights granted in Canada are those known as "the right to claim authorship" and "the right of integrity." Creators have asked for more clarity in the formulation of moral rights. The decisions outlined below are intended to provide such clarity.

Right to claim authorship. This right will allow a creator to

- claim authorship of a work, which means the right to have his or her name appropriately used in connection with the work;
- use a pseudonym or remain anonymous with respect to his or her work;
- restrain others from claiming authorship of his or her work.

The first and third recommendations above provide protection not only for an author but also for the public, which has an interest in not being misled as to the origin of a work.

The above rights will be qualified by allowing them to be waived by an author if so desired. This is often done now, most commonly by ghostwriters.

Right of integrity. Creators have the right to restrain any distortion, mutilation or other modification of their work that would be prejudicial to their honour or reputation.

The revised Act will retain this right; it will keep the wording of section 12(7) of the current Copyright Act and reflect the similar provision of the Rome Text of the Berne Convention to which Canada adheres.

However, a subsequent copyright owner will be able to make such changes as are reasonable in adapting the work to another medium or form or to another length or duration if the author transfers the right to adapt to a subsequent owner.

With regard to unique artistic works, artists feel that the right to restrain any distortion, mutilation or modification prejudicial to their honour or reputation does not provide sufficient protection. It is often difficult to demonstrate such harm. Many artists are of the opinion that the unauthorized alteration of an original artistic work

(e.g. modification for advertising purposes) may by itself be prejudicial to the author's honour or reputation, even if it is not possible to quantify the damage.

In light of this, the moral rights provisions of the Copyright Act will be amended to protect artists when the unique original of an artistic work has been modified without consent. Thus, the artist will be able to prevent any distortion, mutilation or similar modification of the original work without proof of prejudice to honour or reputation.

To prevent possible misuses of this right, it will be made clear that the right does not extend to or encompass the physical relocation of the work or the physical means by which the work is displayed, exhibited or otherwise made perceptible and that any alteration, destruction or change in the structure containing the work that results in a distortion, mutilation or modification of the work is not actionable. In addition, legitimate restoration or preservation activities will not be actionable.



## Section IV

### OWNERSHIP

Section 12(1) of the current Act states that authors are the first owners of the copyright in their work. There are, however, various exceptions in the present Act.

The new Act will maintain the author-as-first-owner criterion wherever appropriate but, as will be seen, there are certain instances where the rule may have to be qualified.

The ownership of copyright works created by employees in the course of employment is one area where the government has decided to pursue further consultations on various alternatives before taking a final position. This issue is discussed in Appendix II of this paper.

#### Author-as-First-Owner

There are two major areas where the principle of author-as-first-owner is modified in the present Act. The first relates to special definitions of the term "author" with respect to works that rely on specific forms of technology for their realization: photographs, sound recordings and motion pictures. The second area consists of those provisions relating to works created in the course of employment or by a commissioned party.

#### Photographs

Section 9 of the Copyright Act states that the author of a photograph is deemed to be the person who is the owner of the negative from which the photograph was directly or indirectly produced.

Ownership of the physical embodiment of a photographic work is itself an insufficient criterion for establishing authorship. Further, since the creation of a photograph is dependent upon the decisions of the photographer, in the new Act the author of a photograph will be considered to be the person who "composed" the photograph, e.g. the photographer. This is consistent with the general principle of copyright law expressed in section 12(1) of the Copyright Act that the author be the first owner of the copyright. A discussion of the ownership situation with regard to

commissioned photographs is presented below in the section dealing with ownership of commissioned works.

### Sound Recordings

In this instance, it is not always easy to determine who should be regarded as the author, since sound recordings virtually always represent the combined contributions of a number of different people performing various functions.

Section 10 of the present Copyright Act provides in part that the person who owns the original plate from which a sound recording may be derived, at the time when the plate was made, is deemed to be the author. Consequently, this person is the first owner of the copyright in the sound recording under section 12(1) of the Act.

As was argued above for photographs, the ownership of the physical plate has little or nothing to do with the act of creating the work. Therefore, the person principally responsible for the arrangements undertaken for the making of the sound recording will be defined as the author. In most instances this person will be the record producer.

### Cinematographic Works

Motion picture films are presently protected either as photographs (i.e. a type of artistic work) or as dramatic works. The author and first owner of copyright in a non-dramatic film is the owner of the negative(s). The author of a dramatic film is not expressly provided for, but appears to be the producer.

The new Act will continue this latter system and provide that the author of a cinematographic work is, in essence, the producer, defined as the person principally responsible for the arrangements undertaken for the making of the work. The ownership of the copyright will thus devolve upon the party constituting the "effective cause" of the work's creation, since the producer hires the persons who collaborate in the creation of the work and coordinates their efforts.

Under this approach the various contributors, like the contributors to a collective work, will continue to have copyright in their individual contributions insofar as they are subject matter of copyright, and provided they have not assigned the copyright to the producer.

### Commissioned Works

Section 12(2) of the Copyright Act establishes an exception to the principle of author-as-first-owner of copyright for certain types of commissioned works (i.e. engravings, photographs and portraits). This section instead stipulates that the commissioner of the engraving, photograph or portrait is the first owner of the copyright in the work.

Interest in maintaining the exception in 12(2) centres on the desire to provide assurance for the personal interest and privacy of the commissioning party. However, copyright legislation is not essentially intended to constitute privacy legislation.

Therefore, section 12(2) will be repealed, and the Act will provide that, subject to an agreement to the contrary, the author of any work is the initial owner of the copyright therein, notwithstanding the fact that the work was commissioned. This will mean that in the case of professional photographers, for example, they will own the copyright in the photographs they have composed unless there is a contractual agreement to the contrary.

### Works Made in the Course of Employment

Public comment is invited on the issue of the first ownership of works created by employees during the course of employment. This issue is discussed in Appendix II of this paper.

### Joint Authorship

Section 2 of the present Copyright Act defines "work of joint authorship" as:

...a work produced by the collaboration of two or more authors in which the contribution of one author is not distinctive from the contribution of the other author or authors.

The scope of this definition is insufficient. The revised definition will provide two guiding criteria to be used in defining a work of joint authorship: first, the intentions of the parties involved, and second, the interdependency or inseparability of the parts.

The first of these concepts will be dealt with by requiring that, for a work to qualify as a work of joint authorship, it should have been the intention of the authors, at the time of creation, that their contributions be merged into inseparable or interdependent parts of a unitary whole.

With regard to the interdependency or inseparability of the parts, the present definition, which refers solely to the lack of distinctiveness between the contributions of the authors, is inadequate in relation to, for example, songs. Often, there are separately identifiable lyrics by one author and music by a second author. Under the present definition, such works do not qualify as works of joint authorship even when it was clearly the intention of the authors that they be so joined.

Where there are clearly identifiable and separable underlying works within a joint work, such as with lyrics and music, the creator of each underlying work will have the right to use that work without the permission of the other creator.

### Collective Works

Section 2 of the Copyright Act defines a collective work as:

- (a) an encyclopedia, dictionary, year book, or similar work,
- (b) a newspaper, review, magazine, or similar periodical, and
- (c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated.

The new Act will include a definition of collective work that sets out a general set of criteria, followed by an illustrative list of examples such as those set out in (a) and (b) above.

Subsection (c), as presently constituted, limits copyright protection to collective works resulting from the collection and arrangement of written works. This is discriminatory, since additional skill and effort must be brought to bear when choosing and arranging any works to form a greater work, whether they be artistic, musical or cinematographic. Therefore, the revised definition of collective works will provide for copyright protection regardless of the class of underlying works.

A further issue concerns the scope of the rights of the owner of copyright in a collective work vis-à-vis those of underlying works contained in the collective work. There appears to have been little jurisprudence on this point in Commonwealth countries. The new Act will contain an explicit provision in this regard, such as that contained in section 201(c) of the American Copyright Act, which states that the owner of copyright in a collective work is assumed to acquire only the privilege of using the contribution for the specified purposes as part of the collective work. Thus the copyright owner of the collective work could not reproduce an underlying work for any other use than as part of the collective work.

#### Moral Rights

Since an author's moral rights are personal in nature, authors and their heirs and representatives should be the only ones who can either own or enforce such rights. At the same time, ease of commercial exploitation of works may require that authors release or waive some or all of their moral rights. Such a waiver, unless it is limited in some specified manner, need only be made once, and all subsequent owners of the copyright will be entitled to rely on it.

When the author is a corporation or other legal entity (as could be the case for sound recordings or films), the same moral rights will be accorded to the corporate author as pertain to a human author.

Under the current Act, it is unclear whether corporations or other legal entities receive moral rights protection even when they are considered as authors. Reputation and goodwill can be just as important for corporations as they are for individuals, and therefore should be protected in a similar fashion.

New corporations should be able to acquire such rights where a merger or takeover has involved the original corporate owner.

Authors will be entitled to moral rights even when they have made an in futuro assignment of copyright (i.e. when they have assigned copyright in a work not yet created).



## Section V

### LIMITATIONS ON RIGHTS

There are several general categories of limitations on the exercise of a copyright owner's exclusive rights. The first category encompasses compulsory licensing provisions whereby anyone can use a work in the prescribed manner upon payment of the prescribed fees without the consent of the copyright owner. The second category relates to the "fair dealing" concept, which has been defined in the Act and interpreted by jurisprudence. This concept pertains to uses that do not interfere with the copyright owner's normal commercial exploitation of the work. The third category includes exemptions permitting the use or reproduction of a work within certain limits.

The Copyright Act now provides for compulsory licences covering the mechanical reproduction of literary, dramatic and musical works, reproduction and public performances of works being withheld from the public, and printing. None of these compulsory licences will be retained in the new Copyright Act. New licences will be created to deal with works of unlocatable copyright owners and certain translations.

A new concept called "fair use" will replace "fair dealing."

The range of present and potential exemptions is extensive. This paper will deal with the specific exemptions already in the Copyright Act as well as other exemptions proposed by various interested groups.

#### Compulsory Licences

Mechanical reproduction. Section 19 of the Copyright Act, introduced in 1921, establishes a compulsory licensing system for the mechanical reproduction of literary, dramatic and musical works. In essence, the section provides that once a mechanical reproduction of such a work has been made, anyone else can make their own recording of that work if they meet the requirements of the Act.

The system was originally introduced because the recording industry feared the monopoly exercise of exclusive rights. Today, however, such a monopoly would be subject to

competition legislation. Record producers require a steady supply of new music to prosper. Music publishers must license a continuous flow of new music to reap the benefit of their copyrights. The two industries are so interdependent that, powerful as they both are, it is unlikely that either would dominate the other if the compulsory licence were abolished.

Most European countries do not have compulsory licences for the recording of musical works. Yet monopoly abuses have been avoided, apparently through industry-wide collective agreements negotiated among music composers, publishers and the recording industry. In France, Germany, and Italy, the recording industries have enjoyed healthy growth without compulsory licensing.

Abolition of the compulsory licence in Canada will probably result in European-style negotiated agreements, for there are already organizations administering mechanical rights in Canada. Given free negotiation between such organizations and the recording industry, a revised Copyright Appeal Board could mediate disputes.

In view of these considerations, the present compulsory licensing provisions for the recording of literary, dramatic and musical works will be abolished.

Reproduction and public performance. Section 7(1) of the Copyright Act provides that 25 years after the death of the author, copies of published works may be made upon payment to the copyright owner of 10 per cent of the unit selling price.

Section 13 allows a potential licensee to petition the Governor in Council for a licence to reproduce or perform in public a work being withheld from the public. The licence can be used only after the death of the author.

Both sections pertain only to works that have been published (or in the case of section 13 alone, performed in public); however, section 7(1) is only operative 25 years after the death of the author, whereas section 13 takes effect immediately upon the author's death.

For Canada, the value of these licensing provisions has been minimal: they have never been used in the 60 years of their existence. Consequently, the licences will be abolished in the new Act.

Printing. Sections 14, 15 and 16 contain what are commonly known as the printing clauses of the Copyright Act. Section

14 provides that any person may apply to the Minister for a licence to print and publish, in Canada, any book in which copyright subsists, if at any time after publication and within the duration of the copyright, the copyright owner fails to have the book printed in Canada, or to supply the reasonable demands of the Canadian market for such books. Section 15 extends a similar principle to certain books published as serials in specific countries. Section 16 contains supplementary provisions and also provides that sections 14, 15 and 16 do not apply to any work of a British subject other than a Canadian citizen or a citizen or subject of a country adhering to the Berne convention.

These provisions were adopted in response to the United States' manufacturing clause, which made American copyright protection for certain works by American authors conditional upon the work being manufactured in that country. In the new 1978 American Copyright Act, however, Canada is specifically exempted from the manufacturing clause provisions.

The printing clause provisions will be deleted from the Copyright Act because no such licences have been issued; they may be in conflict with our obligations under the UCC; and the manufacturing clause of the American Copyright Act specifically exempts Canada.

Unlocatable copyright owners. Although it is sometimes impossible to locate a copyright owner, any use of a work without the owner's authorization could be an infringement under the present Act.

Where copyright owners cannot be located and use of their works could constitute infringement, a revised Copyright Appeal Board will be able to grant a nonexclusive licence to use the work in a specified manner. The licence will be obtainable upon certain conditions:

- proof, to the satisfaction of the Board, that a reasonable effort has been made to locate the copyright owner;
- payment of royalties approximating what would be negotiated in the marketplace;
- proof that the work against which the licence is sought has been published.

The grant of the licence will be discretionary, having regard to the circumstances surrounding the application,

and the Board will have the power to impose appropriate terms and conditions. The Board may withhold consent if it feels that the use would violate the moral rights of the author (who may not be the copyright owner).

The Board will retain the royalties in trust for the estimated term of protection so that, if the copyright owner is located, payment can be made. After the term expires, the royalties will be returned to the licensee or his or her estate.

If the copyright owner does appear after the licence is issued, he or she will be allowed to stop the uses upon payment of compensation to the licensed user.

Translation. Under Article V(2) of the UCC, Canada has the right to include in its domestic legislation a compulsory licensing provision that, under certain circumstances, would allow Canadians to translate works published in UCC countries not also adhering to the Berne Convention. Similarly, Canada is subject to this compulsory licence by UCC countries that are not part of the Berne Convention and have the appropriate domestic legislation, whether or not we ourselves adopt comparable legislation.

The licensing scheme applies if a translation of a work is not available in one of the national languages of the importing state seven years after publication, or if all previous translations are out of print. A national of the importing state may request translation rights from the copyright owner or, if the owner cannot be found, from the publishing company or the appropriate diplomatic representatives of the originating state.

If the copyright owner refuses consent, the appropriate authority in the importing country may grant a non-exclusive licence to translate the work. Demands for unreasonable royalty rates will also be considered refusals of consent.

Compulsory licensing provisions for translations, based on those allowed in the UCC, will be introduced into the new Copyright Act.

The two most important countries that will be subject to this compulsory licence are the United States and the Soviet Union (both are members of the UCC but not Berne).

The revised Copyright Appeal Board could handle the administration of these provisions. The task of checking

the accuracy of the translation, as required by the UCC, could be done by duly authorized experts. Any expense involved could be covered by fees charged to the party requesting the licence. The Board would be required to collect and forward to the copyright owner compensation that is just and conforms to international standards.

### Fair Dealing

Section 17(2) of the Copyright Act states that

The following acts do not constitute an infringement of copyright:

- a) any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary;

This is the only reference to the doctrine of fair dealing.

The Act provides only that fair dealings with a work for the five prescribed purposes are not to be considered infringing dealings. It provides neither a specific definition nor a list of factors to be used in determining whether a dealing or use is fair.

It is the lack of a statutory definition that has, to some extent, led to the confusion and misunderstanding of the fair dealing doctrine.

The new Act will eliminate this lacuna and provide both a definition of fair dealing (to be termed "fair use") and a prioritized list of factors to be considered in determining whether a particular use of a work is a fair use.

"Fair use" will be defined as a use that does not conflict with the normal exploitation of the work or subject matter and does not unreasonably prejudice the legitimate interests of the copyright owner.

Although this proposal is aimed at determining what economic impact authorized uses have on copyright owners, it will still protect works distributed without charge, such as advertising literature, catalogues or free magazines.

In addition to the new term "fair use," there will be a prioritized list of factors that the courts will consider in reaching judgements in particular cases. The first is the impact of the use on a copyright owner's economic reward.

If copying is so substantial as to materially reduce demand for the original, the copyright owner's interests have been harmed. Secondly, the type of work involved and its purpose are also relevant, for the nature of the creation will colour the owner's expectation about how it will be used. For instance, an informational work such as a biography or compilation is created to be used differently than a piece of music. The final factor to be considered is the amount or extent of the taking.

This new fair use doctrine will apply to all copyright subject matter that has generally been made available to the public, regardless of whether such material has been published in the traditional sense.

### Exemptions

Reprography. The reproduction of copyright works by reprography will remain an infringement of copyright in the new law. Reprography is a term describing the making of visually perceptible copies by any means. Modern technology enables the reproduction of copyright works on a massive scale. Reprographic machines are now used in virtually every library, government, business and educational institution.

The uncompensated reproduction of copyright material is perceived by copyright holders as a danger to their economic interests. Unauthorized reproduction of protected material is an infringement of copyright owners' right of reproduction. Copyright owners argue that reproduction directly competes with their own publication and distribution systems. Reduced sales of legitimately published versions reduce revenues of the publishers and owners. This will eventually result in a decreased supply of printed works being created.

Publishers and authors are opposed to the introduction of any exemptions for reprography, preferring that access be provided through negotiated agreements providing for payment in return for authorization for reproduction.

User groups insist that the new Act provide a mechanism to ensure their quick and easy access to works. They also insist on the importance of establishing clear rules and procedures.

In certain instances, current reproduction practices are not providing adequate remuneration to copyright owners. Copyright owners can solve their problem by assigning

their reproduction rights to societies, which could administer the rights vis-à-vis all users. Thus the onus for enforcing existing rights would continue to lie with copyright owners.

The Copyright Appeal Board could mediate any competing claims between the copyright societies and institutional or other users. Any agreed blanket licensing scheme will legitimize all photocopying of those works of copyright owners represented by the society. Where societies representing copyright owners are formed the levies to be collected by these societies could be subject to prior approval by the revised Copyright Appeal Board.

Educational exemptions. It is not proposed to substantially alter the existing law regarding educational use of copyright material. Fair use considerations are applicable to the educational use of copyright material as they are to any other use. Accordingly it is proposed to provide only an exemption from the exclusive rights of public performance and broadcasting to allow in-school performances and broadcasts.

1. Public performance for educational purposes. "Public performance" in an educational context refers to both live performances of copyright works and performance via technological means such as recordings or broadcasts.

Several exemptions in the present Act may apply to certain educational performances. In particular, section 17(2)(a) provides an exemption for "any fair dealing with any work for the purposes of research...." Educators find this provision uncertain in scope and therefore difficult to apply. In addition, section 17(3) exempts colleges and schools from paying compensation to the copyright owners of musical works for public performance in furtherance of an educational object.

Legislative exemptions for educational purposes require a careful balancing of two aims: to facilitate access to copyright material and to avoid interfering unduly with copyright owners' freedom to market their works, including the educational markets. Meeting the latter goal will enable the copyright system to perform its function of stimulating the production and dissemination of educational material.

To take this into account, a limited, specific exemption from the exclusive right of public performance will be granted for certain performances for educational purposes. It will apply to all types of copyright works and be avail-

able only for nonprofit educational institutions. The exemption will apply only to teaching activities where the performers are students or instructors. While clarifying the situation the proposed exemption will essentially not alter the current right of educators to perform copyright material.

2. Dissemination of copyright material by educational broadcasters. There is, at present, no exemption for the use of copyright material by educational broadcasters.

A broad exemption for educational broadcasting or cable diffusion could negatively affect the revenues of copyright owners because of the large audience that can be reached through single transmissions. Such an exemption will not, therefore, be included in the new Act.

However, a minor exemption will apply to broadcasts, cable diffusions and other forms of program dissemination when the production, origination and receipt of the program are confined to the educational institution. This exemption will be subject to the same conditions as that for educational performances. It should be noted that, despite the absence of extensive exemptions for educational broadcasters in the United Kingdom, the United States and Canada, there appears to be a vigorous and expanding educational broadcasting system in each country. Therefore, subject to the small exemption for disseminations within one building, educational broadcasters will continue to require copyright permission for the programs broadcast.

3. Reprographic and audiovisual reproduction of copyright material for educational purposes. Under the present Act, infringement includes reproduction in any material form of a substantial part of a protected work. Such reproduction of copyright material for educational purposes might be exempted by the fair dealing provision. Educators have, however, complained of uncertainty about the scope and application of the fair dealing provision.

In addition to the fair dealing provisions, section 17(2)(d) states that it is not an infringement to include in a collection of mainly non-copyright matter intended for the use of schools short passages from published literary works. The exemption applies when the works themselves are not published for the use of schools, if not more than two such passages are taken from works by the same publisher within five years, and if the source is acknowledged.

There will not be a general exemption for the reproduction of copyright material for educational purposes,

mainly because such an exemption could seriously jeopardize the function of the copyright system in stimulating the production and dissemination of copyright material.

There will, however, be an exemption allowing educators to make copies of works for examination purposes. Suitable language for the exemption would be similar to that contained in section 41(1)(b) of the United Kingdom Copyright Act:

The following acts do not constitute an infringement of copyright: the reproduction in any material form of any work as part of the questions to be answered in an examination or in answer to such a question.

Clearly, educators face problems in attempting to ensure access to much copyright material. In many cases, it is difficult and time-consuming to locate copyright owners of particular works in order to secure permission to reproduce such material. Yet the educational system is generally so structured that educators should be able to negotiate collectively for copyright permissions.

Difficulties tend to occur more in relation to organizing copyright owners, for there can be a large number of such owners with widely differing interests. For the majority of copyright owners, however, if they were organized it should be feasible to negotiate contracts with educational systems.

Archival purposes. The present Copyright Act has no provisions dealing with the reproduction of protected material for archival purposes.

Archivists have indicated a need to reproduce archival material that is deteriorating or is in a state of imminent destruction. They argue further that material should be reproduced on a preventive basis before physical deterioration has set in or before loss has occurred through accident or extensive use.

An exemption will be introduced into the Copyright Act permitting libraries and archives to make limited numbers of copies of unpublished, out of print or otherwise unavailable material already in their collections for reference or preservation purposes.

Ephemeral recording. Ephemeral recording refers to broadcasters' practice of recording copyright material prior to transmission. This is done for technical reasons, and the recordings are often disposed of after being broadcast. Material is recorded because there is frequently a lag between the time the program is produced and the time it is broadcast. Prerecording allows broadcast at the desired date and schedule and permits the continuing automation of broadcasting. Additionally, such recordings allow networks to service the various regions on a variable schedule, in view of the six time zones across Canada.

The current Copyright Act does not contain an exemption to allow such recording. However, broadcasting organizations and copyright associations appear to agree on the need for an exemption to legitimize this practice.

The details of the exemption will include several restrictions. Use of the copy will be limited to the broadcasting organization for which it was originally intended. All organizations concerned with broadcasting, or the preparation of programs for broadcasting, will have the right to record agreed-upon material for their own purposes as long as the material is used solely for the agreed broadcasts. The exemption will also apply when a broadcaster commissions an independent producer to prepare a program.

As the exemption is intended to allow for ephemeral or temporary recordings there is a need for a restricted period for which it will last.

Public comment is invited on the length of time that broadcasting organizations should be allowed to retain copies of an ephemeral recording. Article 11(bis)(3) of the Berne Convention, Brussels and Paris texts, simply states: "It shall, however be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization...." No guidance is given as to how long copies may be retained. National practice varies greatly: for example, 15 days (Italy), 28 days (the United Kingdom and the Netherlands), 3 months (Luxembourg), 6 months (Morocco and the United States) and 1 year (Sweden, Finland and Australia). Some countries, such as Sweden and Finland, place limits on the number of times that the ephemeral recording can be used during the prescribed time period, while others allow any number of otherwise noninfringing uses. There will be no such limit in the Canadian Act.

It should be noted that the right to make an ephemeral recording does not in itself create a right to broadcast

the work recorded. Most works protected by copyright (with the exception of sound recordings) contain a broadcast right; therefore it would be necessary to obtain the authorization of the copyright owner to rebroadcast the work regardless of how long the ephemeral recording may be kept. Broadcasters argue that this provides an adequate safeguard against abuse.

Doubtless copyright owners are concerned that, notwithstanding the provisions of the Act, ephemeral recordings made for broadcast purposes may find their way into other uses if they are kept for too long.

After the period covered by the exemption, broadcasters will be allowed to retain an archival copy of the program for study or research purposes.

These provisions will apply equally to cable or satellite operators as well as traditional broadcasters.

Special materials for the handicapped. Under the present Act, producers of material for perceptually handicapped people enjoy no exemption from the exclusive rights of copyright owners. The most common forms of such special material are braille, largetype literature, talking books, and captioned television or motion picture films. The unauthorized production of this material constitutes an infringement of the exclusive rights of copyright owners to reproduce, publicly perform and broadcast their protected works.

Producers of these special materials have argued that the application of copyright law to such material can severely restrict access to the desired works. The following are among the reasons given for this:

- Limited resources are available for the production of such material; it is often produced by voluntary or charitable agencies.
- Permission to use the copyright work is sometimes refused or granted only with what are seen as unreasonable restrictions or fees.
- It is difficult in many cases to locate the owner of the copyright in particular works.
- The costs inherent in having the clerical and other facilities necessary to secure permissions are seen as an unreasonable burden on agencies that have inadequate resources to carry out their work.

In view of these problems, there will be a general exemption for the benefit of perceptually handicapped persons.

Performance in public by jukeboxes, radio and television sets and audio and video recorders and players. Generally, the public performance of protected works requires the consent of the copyright owner. One exception to this is section 50(7) of the Copyright Act, which frees users of radios and record players from paying royalties to the owners of the copyright in works that are publicly performed.

The section has been judicially interpreted to also exempt public performances by means of "jukeboxes" or similar devices, where the user pays a fee to obtain the performance. The exemption does not include "wired music systems" where the music originates with a phonograph in one location and is distributed by wire or other means to speakers placed in another location or locations. Since the section refers to "gramophone" and "radio receiving set" it may not extend to performances produced by tape recorders or television.

The following subsections discuss aspects of these exemptions. Before reaching final decisions the government is seeking public comment on two issues:

- Should there be any continuing exemption or other special treatment for jukebox performances?
- There will be a limited exemption for certain uses which are essentially private or noncommercial in nature but which may incidentally be public performances. How should that exemption be defined?

1. Jukeboxes. Copyright owners argue that jukeboxes should not be exempted because they clearly involve a commercial use of a work. The jukebox owner and the owner of the establishment receive direct payment for the use of protected works. In addition, the presence of the jukebox may increase patronage at the restaurant or other establishment. It seems incongruous to them that establishments with jukeboxes should be allowed to retain this exemption while nonprofit uses are not granted a similar exemption. That incongruity may appear even greater in light of the decisions announced in this paper, which limit the exemptions for the nonprofit use of copyright works.

Jukebox producers and the owners of establishments with jukeboxes argue that this is a long-established exemption. Changing the rules now would place them in a disad-

vantageous negotiating position vis-à-vis copyright owners, and would reduce the availability of this form of entertainment.

There are several possibilities open to the government. Options to be considered and on which further comment is sought include:

- retention of the existing exemption;
- creation of a compulsory licence with a rate established by statute or by the revised Copyright Appeal Board;
- the phasing out of the exemption over a number of years;
- abolition of the exemption immediately.

Abolition of the exemption would be consistent with the other decisions announced in this paper to limit exemptions.

2. Radio, television and audio and video recorders and players. Copyright owners are also concerned about other types of commercial uses of protected works under this exemption, such as the use of record players in discotheques. They feel that the exemption should not include commercial uses of protected works. However, it is recognized that works are sometimes used in a fashion which, although technically a performance in public, is not intended for commercial purposes. A good example of this is a radio being played by the proprietor of a small retail store. It could be argued that such use is primarily intended for the benefit of the proprietors rather than the members of the public who are present.

The problem is to define the exemption to cover essentially private uses that may incidentally be available to the public. Several ways of defining this exemption, some of which could be used in combination with one another, are listed below:

- leaving it to fair use (this might create unnecessary uncertainty);
- limiting it to audio devices but including both gramophones and tape players;
- limiting it to broadcast devices, i.e. radios and television sets, and excluding audio and audio-

- visual playback devices (including television sets used as playback devices);
- limiting the size, capacity and number of speakers of the device used;
  - allowing only uses primarily intended for employees;
  - allowing uses only in establishments with fewer than a specified number of employees;
  - prohibiting the use in any establishment for which there is an admission charge;
  - prohibiting the advertising of the fact that the device is on the premises.

Freedom of speech and the press. Presently, there are three specific limitations on copyright based on "freedom of speech" and "freedom of the press" considerations. Section 17(2)(a) provides that "fair dealing with any work for the purpose of...criticism, review, or newspaper summary" does not constitute infringement. Section 18 provides that publishing "a report...in a newspaper" of "an address of a political nature delivered at a public meeting" does not constitute infringement of the copyright in the address. Finally, section 17(2)(e) provides generally that publication of a newspaper report of a public lecture is not infringement unless a notice is posted at the place where the lecture is delivered prohibiting such a report.

There are problems with these limitations. For example, section 18 exempts only the publishing of a report of a "political" nature. Since it is important to guarantee both effective reporting and effective public debate of issues, the courts should not be asked to determine the legitimacy of access to copyright material on the basis of whether the subject matter is "political."

Both section 18 and section 17(2)(e) provide exemptions for the reporting of lectures or addresses delivered in public. The most obvious problem with these sections - if they are intended to ensure press access to political and other material - is their limitation to public addresses. Such a limitation may exclude messages of public concern delivered through other media and in some form other than a lecture or address.

Sections 17(2)(a), 18 and 17(2)(e) all refer to use of protected material in newspaper reports or summaries.

This limitation to the chief press medium in existence in 1921 when the current Act was passed (the newspaper) is inappropriate in the context of contemporary reporting. A comprehensive exemption should clearly allow for the use of protected material in all media.

On the basis of the above arguments, the present sections 18, 17(2)(a) and 17(2)(e) will be deleted from the Act. The new fair use provision discussed elsewhere in this paper may be broad enough to allow for fair use of copyright material based on the needs of press reporting and analysis, and could be applied to all media.

Where the fair use doctrine cannot resolve the tensions between copyright and freedom of speech and the press, resort could be had to section 2(b) of the Canadian Charter of Rights and Freedoms, which contains the fundamental freedoms of expression and the press. Given the scope of application of the Charter, the freedoms contained in it can prevent any potential abuses by acting as a qualification or implied exemption to exclusive rights under copyright.

However, to avoid possible confusion or misinterpretation of the limits of copyright there will be an explicit exemption allowing the press to carry on its necessary reporting and analysis functions.

Legislative, judicial, and administrative proceedings. The present Copyright Act does not provide an exemption for the use of copyright material in legislative, judicial or administrative tribunal (e.g. the CRTC) proceedings or in reports of such proceedings.

Given the importance that Canadian society places upon effectively functioning legislative and judicial systems, it should be explicitly stated in the Copyright Act that copyright material can be used without liability in certain proceedings. A specific exemption will be introduced covering all works used in legislative, judicial and administrative proceedings and the publication of official or unofficial reports of such proceedings.

Public performance of musical works at agricultural exhibitions or fairs. Subsection 17(2)(g) of the current Copyright Act exempts from copyright infringement

the performance without motive of gain of any musical work at any agricultural, agricultural-industrial exhibition or fair which receives a grant from or is held

under federal, provincial or municipal authority, by the directors thereof.

This exemption was first introduced in the 1930s. Canadian jurisprudence has, however, interpreted this provision in a very restrictive way. The Supreme Court has ruled that, for the exemption to be applicable, there should be no motive of gain on the part of either the promoters or the musicians. This decision has, in effect, stripped the section of all practical application.

There is no doubt that agricultural fairs play an extremely important role in promoting public knowledge of the best agricultural practices and methods, and that they should therefore be encouraged. There appears, however, little justification for forcing composers to be the only category of participants in the musical presentation (musicians, instrumentalists and singers, ticket sellers and ushers) who are not paid for their services.

On the basis of these considerations, the exemption currently provided for in section 17(2)(g) of the Copyright Act will be abolished, to be replaced by a system of blanket licensing. Calculation of royalties payable to the holders of public performing rights for musical works could be approved in advance by a revised Copyright Appeal Board under the system operated by the musical performing rights societies.

Performance of a musical work for religious or charitable purposes. Section 17(3) of the current Copyright Act exempts religious and charitable organizations from paying compensation to the owners of copyright in musical works when those works are publicly performed in furtherance of a religious or charitable object. Section 17(3) does not actually grant a complete exemption from copyright, but provides that no monetary compensation is required. Copyright owners could still seek an injunction to prevent a performance.

There does not appear to be sufficient justification at this time to continue these wide-ranging exemptions. Copyright owners are free to waive their rights for religious or charitable performances but they should not be obliged to do so.

Therefore, the exemption in section 17(3) will be abolished. However, a specific exemption will be provided to allow the performance of music during religious services. In these circumstances, the congregations are engaging in activities inseparable from the practice of their

faith, and it would be offensive to many Canadians to have such activities characterized as infringements of copyright.

The exemption will not apply to services broadcast or diffused outside the location where the service takes place.

The fees to be paid by a charitable or religious organization for the performance of a work for charitable or religious purposes will be subject to the approval of the Copyright Appeal Board, which will take into account the altruistic purpose of the performance.

Certain reproductions of artistic works in public places. Section 17(2)(c) of the Copyright Act provides that it is not an infringement to make and publish two-dimensional reproductions of sculptures, works of artistic craftsmanship or architectural works of art that are permanently situated in a public place or building.

An exemption similar to the current section 17(2)(c) will be retained, for it is in the nature of works situated in public places to be considered as part of the public landscape. The exemption will also extend to cinematographic and broadcast reproduction of such works.

Incidental use in a television broadcast. It has been suggested that the new Copyright Act contain a provision permitting the inclusion of an artistic work as background or as otherwise incidental scenery in a film or television broadcast. However, such a specific copyright exemption is not the appropriate manner in which to deal with the matter.

It is not clear why the ordinary copyright principles should not be applied here when they are applied in most other circumstances of the incidental or other use of copyright material. The limited purposes served by this section can be better served by the new fair use provision discussed in this paper. Therefore, an "incidental use exemption" will not be adopted.

Reconstruction of buildings. Currently, copyright can subsist in the plans of buildings and potentially in the buildings themselves as architectural works of art. The reconstruction of a building that has been destroyed without the consent of the copyright owner would therefore be an infringement of copyright.

The government believes that the copyright owner of the plans should not expect to receive further remuneration for the original design work if a calamity destroys the

building. Thus, the new Copyright Act will contain a provision similar to that in the United Kingdom's legislation allowing for the reconstruction of partially or completely destroyed buildings without the consent of copyright owners.

Use of matrices of artistic works. Section 17(2)(b) provides that an artist who does not retain the copyright in a work may use certain materials used to produce that work to produce a subsequent work, without infringing the copyright in the earlier work, provided that he or she does not repeat the "main design" of that work.

It is doubtful that this section as it is currently drafted adds anything meaningful to the protection of artists in their use of matrices of earlier works. However, the section would be more useful if its wording were changed to provide more certainty. As a result the end of section 17(2)(b) will be amended to read that there will be no infringement "if the subsequent work taken as a whole does not repeat or imitate the main design of the previous work."

Public recitation of extracts. Section 17(2)(f) provides that it is not infringement for any one person to read in public an extract from any published work.

The limited purposes served by this section can be better served by the new fair use provision discussed in this paper. This section will therefore be deleted.

Section 11 of the Cultural Property Export and Import Act. To preserve Canada's national heritage, the Cultural Property Export and Import Act provides that it is an offence to export certain types of objects without first obtaining an export permit. Section 11 of that Act requires the deposit in an institution designated by the Minister of Communications of a copy of "manuscripts, original documents, archives, photographic positives and negatives, films and sound recordings" that are to be exported. When the Cultural Property Export and Import Act was passed, an exemption was added to the Copyright Act (section 17(2)(h)) providing that the making of such a copy for deposit shall not constitute an infringement of copyright.

The copyright exemption is necessary in order to make the copy deposit requirement of the Cultural Property Export and Import Act workable and to avoid potential conflicts between that requirement and copyright. In many instances the person wishing to export material may not be the copyright owner. Sometimes the copyright owner may not be prepared to give consent to such copying, at least on reasonable terms. In other cases it may be very difficult to identify and to locate the copyright owner.

The public interest in preserving in Canada a copy of materials of cultural and historical significance justifies the limited qualification on the rights of copyright owners contained in this exemption. The exemption does not interfere significantly with copyright owners' usual commercial exploitation of protected material; nor does it seriously affect their noncommercial interests in that material. The present exemption will be retained.

Access to Information Act. This Act came into effect in 1983. Its intent is to increase the availability to the public of information held or generated by the government. In many instances the government is holding information in which the copyright is owned by third parties.

To allow the government to comply with the provisions of the Access to Information Act without infringing copyright, it was necessary to introduce an exemption to allow the making of copies of material to be sent to applicants.

Sections 17(2)(i) and (j) and section 17(6) of the current Copyright Act were added as a result of the Access to Information Act. These exemptions will be retained in the new Act.



## Section VI

### TERM

The general term of protection in Canada is the life of the author plus 50 years, as provided in section 5 of the Copyright Act. There are, however, exceptions for certain categories of works. This section will examine the current terms of protection for all categories of works and indicate changes. Wherever reasonable, the general term of life plus 50 years will be incorporated into the new Act.

#### Literary, Artistic, Musical and Dramatic Works

The general term will be slightly modified from the date of the author's death plus 50 years to a calculation dating from the end of the year of death.

Two major factors argue for construction of a term along these lines.

- A system based on the life of the author avoids confusion and uncertainty, since the date of death is clearer and more definite than the date of publication. It also means that all of the given author's works will enter the public domain at the same time, rather than at intervals, as would occur if the term was based upon publication date.
- The majority of the world's countries have a term of life plus 50 years. Adoption of the same term expedites international commerce in copyright works.

#### Sound Recordings and Cinematographic Works

At present, copyright protection for sound recordings extends for 50 years from, in essence, the creation of the work.

As noted earlier, certain film productions are currently protected as a species of dramatic works while others are protected as photographs. Films that constitute dramatic works are protected for a term equal to the life of the author plus 50 years. In contrast, films that consist of a series of photographs are protected for a term of 50 years from the making of the original negative from which the photographs were directly or indirectly derived. The term of

protection for sound recordings and cinematographic works should not, however, be based upon the life of the author because corporations can be authors of such works.

The term of protection for sound recordings and cinematographic works thus will extend until the expiry of either of the following:

- the period from the date of first publication until the end of that year plus 50 years thereafter, or
- in instances where the work is not published, the period from creation until the end of that year plus 75 years thereafter.

### Photographs

Photographs are considered a species of the broader class of artistic works, which includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings. The other works in this class are protected by copyright for the life of the author plus 50 years. The present Copyright Act, however, provides that the term of protection for photographs is to be 50 years from the making of the original negative from which the photograph was directly or indirectly derived.

Since there do not appear to be any overriding policy considerations meriting retention of the shorter term of protection accorded to photographs, under the new Act the term will be the same as that for all other artistic works.

### Works of Joint Authorship

In section 8(1) the present Act provides that copyright in a work of joint authorship is to last for 50 years after the death of the last surviving author.

These provisions are both consistent with the other provisions with respect to term of protection and in accordance with Canada's international obligations under the Berne Convention. Accordingly, the present term of protection for works of joint authorship will be retained.

### Posthumous Works

The term of protection for literary, dramatic or musical works or engravings unpublished at the time of the

author's death could, under our present Act, be perpetual, provided the work is never published or, if a dramatic or musical work, never performed in public, or, if a lecture, never delivered in public. The term of protection for artistic works, on the contrary, is always life of the author plus 50 years and is never dependent upon whether they have been published either during or subsequent to their creator's lifetime.

Incorporation of the special provisions for posthumous works seems to have been predicated on the desire to protect authors and copyright owners from unwarranted derogation of their private rights. However, the general term of life plus 50 years does provide an adequate measure of protection from any such derogation. Thus the general term will hold for all works, and the present provisions dealing with posthumous works will be abolished.

#### Works of Unknown Authors

The present Copyright Act makes no reference to the works of unknown authors. Since in these cases the copyright term cannot be based upon the life of the author, some other method of computation must be used.

The new Act will explicitly provide that the term of protection for works of unknown authors will be the same as that given to unpublished sound recordings and cinematographic works: that is, 75 years from creation.

#### Reversionary Interest Proviso

Section 12(5) of the present Copyright Act provides that, in certain prescribed circumstances, a party who has acquired one or more of the rights comprising the copyright in a work ceases to own such rights 25 years after the author's death. This applies despite the fact that the party was granted such rights for the full term of protection. This provision constitutes an inequitable intrusion into the ability of the parties to agree to expiration terms of their own choosing and is inconsistent with the adoption of a general term of life plus 50 years. Further, it appears that the provision has seldom been used. This provision will therefore be repealed from the Act.

### Moral Rights

The present Act does not provide a specific term of protection for moral rights. It can be argued that because moral rights are intended to protect an author's personal honour and reputation, they should expire on the author's death. However, moral rights possess value; for example, the reputation of an artist influences the monetary value of his or her work. Moreover, corporate authors are entitled to have their moral rights last for the period of copyright protection.

Under the new Act, therefore, authors' moral rights will last for the same term as their economic rights, since there is not always a clear distinction between the two.

### Crown Copyright

Under Section 11 of the present Copyright Act, works produced for the Crown have a term of protection of 50 years from the date of first publication.

There will be no special provisions in the new Act regarding the term of protection for works prepared or published by or under the control of the Crown. The term will be the same as that attaching to the particular category of work created.

## Section VII

### DISPOSITION OF COPYRIGHT

The rights granted under copyright may be transferred, either wholly or partially, by means of assignments of ownership. Permission to use works in certain prescribed ways can also be granted through either exclusive or non-exclusive licences. Copyright may be divided by rights, by time or by territory. Thus a copyright owner may transfer one specific right to a third party for a limited period of time and for a defined territory.

No changes to the substance of those transfers will be made in the new Act, although certain details will be altered.

#### Divisibility of Copyright

By rights. Section 12(4) of the current Copyright Act permits an assignment of copyright either wholly or partially. It thus seems that the rights to reproduce, perform or adapt can be separated, for example, although this is not explicitly stated. The new Act will permit the owner of a copyright to transfer any of the exclusive rights, including any subdivision of the rights specifically enumerated in the Act.

By time. Presently section 12(4) allows for the division of any of the rights comprising copyright, for either the whole term of copyright or any part thereof. There have been no proposals to alter this section and there are no strong public policy reasons for making any changes.

By territory. Section 12(4) of the Act provides that copyright is divisible not only as to rights and as to time but equally "subject to territorial limitations."

Thus a copyright owner can appoint one particular publisher to issue a work in one area of Canada and appoint another to publish the same work in a separate edition for the rest of Canada.

What must be understood, however, is that the territorial grant of rights, whether international or intranational, does not carry with it the right to control the distribution of legally made copies once these are available in the marketplace.

The only control that copyright owners have over where their works are sold is through the specific provisions of the Act that prevent the importation or sale of certain foreign editions.

Within these constraints the new Act will maintain the right of copyright owners to assign their rights "generally or subject to territorial limitations."

#### The Requirement of Writing

Section 12(4) of the present Act states that in some cases a conveyance of part or all of the copyright must be in writing, signed by the owner or an authorized agent. This requirement is restricted to assignments and licences that grant an interest in the copyright. Thus, both non-exclusive and exclusive licences that do not entail a proprietary interest may be granted orally.

The new Act will require written conveyances for both assignments of copyright and exclusive licences, but not for non-exclusive licences.

#### Testamentary Dispositions

For the purposes of certainty, the new Copyright Act will provide that where the original of any work not previously published is devised by will, the beneficiary will receive the copyright in the work provided that the testator was the copyright owner at the time of death. The present Act is silent on this matter.

#### Copyright in Future Works

The present Act lacks any provisions for recognizing the assigning or licensing of copyright in works to be created in the future. To correct this situation the new Act will contain provisions permitting the valid legal assignment or granting of a licence of a future copyright. This will permit, for example, a publisher and an author to reach agreement on the copyright ownership of works yet to be written.

## Section VIII

### COPYRIGHT SOCIETIES AND A REVISED COPYRIGHT APPEAL BOARD

#### Copyright Societies

In copyright law, a copyright society is an organization to which copyright owners may assign or license all or part of their rights for the purpose of exploitation and enforcement.

Regulated organized administration of copyright can ensure that copyright owners secure equitable revenues for the use of their works without unnecessarily restricting users' access to them. It further provides users with confirmation of their right to use copyright-protected material and can give legal recognition to such use.

The functions of the present Copyright Appeal Board could be broadened to encompass new societies. Such an enlarged responsibility would require an elaboration of powers and duties in the revised legislation. A proposed scheme is outlined in this section, and the government hopes that interested parties will comment so that the exact scope and extent of a revised Board's mandate can be determined.

This section will discuss the areas where new societies may be expected to arise and indicate some of the functions that would be undertaken by a revised Copyright Appeal Board.

Organized exercise of copyright is needed for two major reasons:

- changing technological circumstances, which have greatly expanded opportunities for unauthorized reproduction and use of copyright-protected material;
- the high costs of transactions, which may be so great as to make it impracticable for copyright owners to negotiate individually with users, such as in the case of photocopying, access to copyright material by educational users, or use of musical works by radio stations.

In those circumstances, it may be in the interest of all parties to provide cooperative mechanisms for the enforcement of rights and the collection of fees.

The present Copyright Act concerns itself only with the activities of the musical performing rights societies dealing with musical and dramatico-musical works. The rates collectable by these societies are approved by the Copyright Appeal Board.

The Act does not prevent the formation of copyright societies in other areas, but the organized setting of tariffs for use of copyright-protected material may in some circumstances be counter to the Combines Investigation Act.

In light of these considerations it is envisaged that the new Copyright Act would permit the wider use of copyright societies, including their use in the areas noted above. These societies would arise from private initiatives when prompted by market forces.

To protect the public from possible excesses by copyright societies, they would be subject to the control of the revised Copyright Appeal Board.

Further proposals follow regarding the concerns of creators about their own relationships with the societies. These concerns relate to the fairness of distribution schemes and the control of the operations of the societies.

To ensure that their distribution schemes are fair and efficient, the societies would be required to file their distribution and monitoring schemes with a revised Copyright Appeal Board. The Board would, on the application of a member of a society, have the authority to review the schemes and veto any scheme deemed unfair.

To meet the concerns of copyright owners that their rights be protected from potential abuse by the societies, the new Act would provide that:

- the Governor in Council may establish a standard licensing agreement for the licensing of rights from a copyright owner to a society. This provision will ensure that copyright owners are not forced to enter into contractual commitments of an unnecessarily long duration or to assign rights in bulk to a society. A copyright owner would be allowed to grant one or more rights to a society or retain certain rights.

- a revised Copyright Appeal Board would ensure that the Boards of Directors of societies be elected democratically by the members of the societies.

#### A Revised Copyright Appeal Board ✓

The Copyright Appeal Board has existed in Canada since 1936. It approves the rate schedules of the two existing performing rights societies.

These societies acquire copyrights for musical and dramatico-musical works and then grant blanket licences allowing various classes of users, such as broadcast stations, concert halls, exhibitions, bars and similar users, to utilize their repertoires. The performing rights societies have reciprocal arrangements with comparable societies throughout the world. This gives Canadian users access to a vast international repertoire of copyright music and enables Canadian composers to collect royalties from the use of their works in other countries.

The purpose of the Board is to ensure equity between societies and users. Similar bodies have subsequently been created in such countries as the United Kingdom and Australia. In many countries, however, these societies are controlled by other means, such as the general anti-combines or anti-trust laws.

In recent years other classes of copyright owners have become interested in forming societies to negotiate and enforce certain of their rights. This is particularly true of writers and publishers of printed material, who are concerned about extensive photocopying. In principle, there is nothing to prevent them from forming copyright societies similar to the performing rights societies and operating within the generally applicable provisions of anti-combines law. Most copyright owners, however, would prefer the certainty provided by a regulatory mechanism that approves rates and thereby greatly reduces the chance of prosecution under anti-combines law.

The existing Board could therefore be replaced by a revised Board, which would have an expanded role, including the power to approve rate structures. Once an exercise of rights comes within the jurisdiction of the Board, all negotiations between societies and users about that right would fall under the jurisdiction of the Board. This would be purely permissive legislation, however, and creators or other copyright owners would not be required to join a society. All copyright owners who are not members of a society

would be free to negotiate with users individually. Similarly, other types of societies could arise outside the jurisdiction of the Board. They would be subject to the general provisions of competition law.

Once rates and reporting requirements were approved by the Board, anyone could use the works in the society's repertoire after paying the approved fee and meeting the approved reporting requirements regardless of whether the user had a contractual relationship with the society. This provision is comparable to section 50(10) of the current Act, which covers the performance of musical works.

In this context the revised Board would operate in a fashion similar to the current Board under sections 48 to 50 of the Copyright Act.

The Board would also exercise the two discretionary functions proposed and explained elsewhere in this paper:

- the right to approve the translation and publication of certain foreign works allowed under Article V(2) of the Universal Copyright Convention; and
- the right to authorize the use of a work where it is not possible to locate a copyright owner.

The Board would consist of members appointed by the Governor in Council on a full- or part-time basis depending on the workload. Members could be appointed for a fixed term subject to renewal and could be removable only for cause. Initial terms could be staggered to ensure continuity of membership. The Chairman could be chosen from among the membership by the Governor in Council.

The Board would be an independent body reporting to Parliament through the Minister responsible for copyright, and could have administrative and research staff under its direction.

According to section 49(1) of the current Copyright Act, statements of all fees, charges or royalties proposed to be collected by each society during the next ensuing calendar year are published in the Canada Gazette, so that any person objecting to these proposals may lodge an objection with the Minister within the prescribed period.

Some groups have suggested that the rates should be published in newspapers in addition to or instead of in the Canada Gazette. Given the administrative costs and diffi-

culties of publishing those proposals in local newspapers they will continue to be published in the Canada Gazette. In addition, other means of making known such tariffs may be established by regulations.



## Section IX

### REMEDIES FOR INFRINGEMENT

The major objectives of a copyright enforcement policy are to secure compliance with the law and to provide for restitution if the copyright owner's interests have been damaged. As with all aspects of the Act, the remedy provisions must be seen to be fair to both users (defendants) and owners (plaintiffs) both in the letter of the law and in its application. In the new Act all remedies will be available for infringements of both economic and moral rights.

#### Civil Infringements and Remedies

Infringement. Traditionally, it has been accepted that the Copyright Act defines two basic types of infringing acts. The first is direct infringement, under which a work is infringed by any person who without the consent of the owner of the copyright does anything that only the owner has the right to do under the Act.

Innocence or ignorance of the existence of copyright is not a valid defence to an action for direct infringement.

Indirect infringement relates to certain commercial activities, such as selling infringing copies of books; these activities are considered infringements of the copyright owner's rights even though they do not involve acts to which the copyright owner has exclusive rights.

With respect to acts of indirect infringement, a plaintiff must prove three things: that the act was committed, that the defendant knew that the act was committed, and that the defendant knew that copyright was infringed. Thus innocence may be a valid defence in this case.

Strict liability as a solution. To provide an infringement-free environment it is necessary to strike infringement where it is most visible: when the infringing material comes into contact with the public.

As a result, it is proposed to remove the defence of innocence for people dealing in or importing infringing material. Strict liability will apply to all persons who interfere with the exclusive rights of the copyright owner and to all persons who deal in or import infringing works, subject to specified limitations.

This proposal should expedite the resolution of disputes and encourage owners to sue by reducing the risk of their not receiving any compensation after undergoing the expense and risk of enforcement proceedings.

An exception to this would be the case where authorized copies are imported. As opposed to a situation where the copies were illegally made in a foreign country, the importer would not have the right to claim compensation against the foreign party in its home jurisdiction. Therefore, equity demands that importers of authorized copies not be liable unless they know the goods infringe in Canada.

Finally, to avoid interfering too much in trade of copyright articles under a system of strict liability, immunity will apply to persons who innocently acquire articles for their own use.

Remedy provisions. Remedy provisions usually serve three main functions. First, they provide restitution to copyright owners whose interests have been damaged by infringement. Second, injunctions and orders to deliver up infringing goods or plates can be used to forestall potential infringements. Third, exemplary or punitive damages can be used to punish repeated or flagrant infringers and to serve as a warning to other would-be infringers.

Remedies must limit the degree of damages, so that the fear of damage awards being imposed on persons who unknowingly commit indirect infringements will not interfere unduly with trade in copyright materials. Limiting the degree of damages due under conversion should assuage the concerns of user groups who feel that a system of strict liability is unduly harsh.

In this case the method of calculating statutory compensation will yield a precise amount suitable for immediate judgement. The purpose of this approach is to avoid, where possible, the delay and expense of an assessment of compensation. The sum could be calculated on the basis of the sale price of the articles involved, and would be close to a typical gross profit margin to avoid excessive risk to dealers in copyright material.

The amount payable in damages will be reduced if the defendant cooperates by giving the source of the goods.

However, direct infringers will continue to be liable for actual damages caused, regardless of their intent or knowledge.

Indirect infringers will be liable for actual damages when the plaintiff can show that a reasonably knowledgeable person in the trade would have suspected that the goods in question were made or otherwise obtained in violation of the rights of a copyright owner or those claiming on the owner's behalf.

This scheme of strict liability will ensure that copyright owners receive at least a reasonable amount of restitution from the infringing use of their works while providing that the unknowing indirect infringer does not incur heavy damages because of another's actions.

In indirect infringement proceedings not involving trade in infringing articles, a copyright owner will be entitled to compensation determined by calculating what a willing buyer would pay a willing copyright owner for use of the copyright material.

This compensation is a reasonable royalty and a form of statutory damage or compensation. It means, in effect, that copyright owners will be able to base the amount of their claims on the level of compensation paid by or to the parties for similar uses, practices in the trade, and the opinions of persons experienced in the business.

Copyright owners will have an absolute right to seize or obtain the destruction of infringing plates or masters. They will also be allowed to seize and dispose of other infringing articles, subject to the right of nondeliberate infringers to apply for an accounting of proceeds from the disposal of such articles or for directions as to their disposal. The court's powers on such an application will be discretionary. They will include the power to order the return of infringing articles to nondeliberate infringers (upon payment of compensation) where justified by undue hardship to the defendant. In addition, the courts will be able to order a defendant to arrange the recall of goods.

The rationale for giving the copyright owner the plates or masters is straightforward, for little can be done with such plates once an infringer has been enjoined from using them to make further copies.

The courts will also retain the authority to grant injunctions. This injunctive power is very broad and elastic; it is an equitable, discretionary remedial power exercised in light of all the circumstances in a case. Injunctions can be mandatory or prohibitory in nature; they can be granted on very short notice, and used to prevent infringements that otherwise appear to be imminent.

The courts' power to render declaratory judgments and grant exemplary damages will also be made explicit.

✓ To assist the courts in deciding whether to impose exemplary damages against deliberate infringers, the new Act will set forth a list of factors to be taken into account. The list itself will be exemplary and not exhaustive; it will include the following factors:

- the actual damages suffered,
- the benefits enjoyed by the defendant,
- the flagrancy of the infringement,
- the need for deterrence,
- the value to the defendant or others of the material taken.

Procedures. Two aspects of procedural matters are important: presumptions; and entitlement to sue.

The new Act will provide that the person whose name appears on the face of a copyright work is presumed to be the author in the absence of proof to the contrary. The presumption will apply to authors, publishers or plaintiffs claiming under them.

In copyright proceedings a work will be presumed to be in copyright and the plaintiff will be presumed to have the right to sue unless, prior to trial, opposing parties obtain leave to contest these issues. This should ease the technical and administrative burden on plaintiffs, who now must present documents to prove the title of all the copyrights in question.

Individual copyright owners, exclusive licensees and copyright societies will be entitled to sue and obtain injunctions if either individual works or a repertoire suffer infringement.

#### Criminal Offences and Sanctions

Given the economic nature of copyright, civil remedies will play the major role in copyright enforcement, for they are readily available in most instances.

There are some cases, however, where criminal sanctions rather than civil remedies are the appropriate instrument. Sometimes the magnitude of the infringement makes it either too costly or too complex for a private party to sue, or the socially reprehensible character of the conduct calls for public condemnation.

The current Act defines a number of separate and distinct offences. Apart from the addition of specific technologies not explicitly covered by these provisions, such as film and broadcast performances, the existing offences will be maintained.

However, the penalties will adequately reflect today's economic circumstances. The maximum penalty for these offences will be a multiple of the value of the gross sales, the rental income or the remaining inventory of the infringing material, or a combination of these. The maximum fine for performances will be a multiple of the proceeds of any sale of tickets for the performance. If the values cannot be estimated, the maximum fine will be \$25,000.

✓ An indictable offence punishable by a fine, a jail sentence, or both, will be created to deal with serious commercial infringements that include the following ingredients:

- deliberate perpetration;
- commission for commercial benefit or by way of trade;
- production, distribution, rental or sale of the goods;
- without colour of right;
- either a potential or actual benefit to the perpetrator exceeding \$5,000 or commission of the act knowing that it may prejudicially affect in a serious way any person's copyright.

The fine will be established according to the rules mentioned above.

The maximum penalty for such offences will be from two to five years imprisonment in addition to or in lieu of the fine.



## Section X

### REGISTRATION

Sections 36 through 40 of the present Copyright Act describe the registration system. These sections enable anyone with an interest in a protected work to register copyright in that work, and also to register any assignment or licence granted therein. Registration is effected by filing the appropriate forms with the Copyright Office and paying the required fees. As registration is optional, the owner does not forfeit copyright by failing to register.

There may, however, be advantages for the owner in registering, since an assignment of copyright is void against any subsequent bona fide assignee who has registered that assignment. Registration also overcomes the defence of section 22, by which a defendant may claim to have been unaware of copyright. In such circumstances, the plaintiff is not entitled to any remedy for infringement other than an injunction.

The value of a copyright registration system is essentially predicated on the information collected. The only certain method of ensuring complete and accurate information is through obligatory registration combined with deposit requirements.

The present Canadian system is permissive, the information required on the registration form is very limited and there are no deposit requirements; thus registration data are inconclusive and incomplete. The evidentiary advantages that might be associated with registration could be achieved, at no cost, through statutory presumptions favouring the plaintiff, particularly with respect to proof of ownership. The new Act will include presumptions that the work is protected by copyright and that in court proceedings the plaintiff is the owner of the copyright.

Ideally, if Canada wished to have a complete copyright information system, it would adopt something similar to the American system. This approach has been characterized as "quasi-permissive" since, though copyright registration is permitted and is not mandatory for the acquisition of copyright, it is a prerequisite to the maintenance of an action for copyright infringement. An American-style system would, however, conflict with the Berne Convention's "no formalities" requirement and thus is not a viable alterna-

tive for Canada. Adoption of the American system would also require a very significant increase in administrative machinery.

The evidentiary advantages provided by the current permissive registration system can be better handled by changes to the presumptions of ownership in court proceedings. As well, a mandatory registration system that would provide complete information is not possible under Canada's international obligations. For these reasons the decision has been made to abolish copyright registration.

## **Section XI**

### **CROWN**

Section 11 of the current Copyright Act states that where a work is prepared by or under the direction or control of the Crown or a government department, copyright belongs to the Crown in the absence of an agreement to the contrary with the author.

Some consideration could be given to the abolition of copyright for works of the Crown. Indeed, this is the law in the United States, where all works produced by the federal government are in the public domain. It is argued that public access to those works should be unrestricted because the public, having paid for its creation, is the owner of the work. In many cases, however, the exploitation of Crown-produced works, such as those of the National Film Board and the CBC, is dependent upon the exercise of copyright. As the Crown can waive its rights where protection is not required, copyright will remain in Crown works. The continuation of Crown copyright ensures that the Crown will be able to enforce its copyrights when such action is in the public interest.

In order to assuage fears that the Crown might unduly restrict public access to important government materials, guidelines will be formulated outlining government policy and indicating the classes of works for which Crown copyright will or will not be enforced. This is the approach followed in the United Kingdom. The factors that should be taken into account in the Canadian guidelines are the following:

- the furtherance of the broadest possible dissemination of information;
- the protection of official material from misuse by unfair or misleading selection, undignified associations, or undesirable use for advertising purposes; and
- recapture of public funds spent on the creation of such works where there is a market demand.

There presently exists in Canada a Crown prerogative right to authorize printing and publishing of works such as

Acts of Parliament and judicial decisions. In view of the above proposals for the exercise of Crown copyright, and in order to ensure the integrity of use of such works, this Crown prerogative right will remain.

#### Ownership of Crown Copyright

Crown copyright includes works created by Crown employees during the course of employment. The issue of ownership of employee-created works is discussed in Appendix II to this paper and comment is invited from the public. One aspect of the issue is whether all works created by Crown employees during the course of employment should be treated in the same fashion as other works.

Even if the government accepts as a general principle that employees, including Crown employees, should be the first owners of copyright, employee ownership will not extend to copyright in works such as judicial pronouncements and works of the legislature, which will be owned by the Crown. This will ensure that copyright in the laws of the land and in all judicial decisions will always belong to the Crown and not to any individual.

#### Crown Use of Private Copyright Material

It is debatable whether the Crown is currently bound by the Copyright Act. As nothing in the Act explicitly binds the Crown, it can presumably use the works of third parties with impunity. Section 16 of the Interpretation Act provides that the Crown is exempted from statutory provisions unless explicitly included within their ambit. Despite this immunity, the Crown now generally respects copyright.

The strongest argument against imposing liability on the Crown is that the federal and provincial governments should have the right to use works (such as for copying or translating purposes) when it is necessary for the administration of government even if the copyright owner withdraws consent.

However, if the new Act were to give the Crown special consideration in the use of third party works, it could be argued that the Crown is putting itself in a privileged position and is not willing to follow the dictates of its own legislation. Also, since it has been recommended that

the Crown enjoy copyright protection for its own works, it would seem appropriate for the Crown to accept the obligations imposed upon other users.

For these reasons both the federal and provincial governments will be explicitly bound by the new Act.



## Section XII

### THE INTELLECTUAL PROPERTY PROTECTION OF COMPUTER PROGRAMS

#### Background

Computer programs in a human-readable form are protected under copyright law in the same way as any other form of literary or scientific work. Such protection is for the life of the author plus 50 years and is subject to all the other generally applicable provisions of copyright law. According to Canada's copyright treaty obligations, computer programs in that form must be protected and certain basic features of the protection, such as the minimum term and the author's moral rights (section 12(7) of the current Copyright Act), are established by those treaties. The new Copyright Act will continue such protection for programs in that form.

The current status of computer programs in machine-readable form is far less clear. It can be argued that copyright protects only works intended for and capable of human comprehension. Yet it can also be asserted that computer programs in machine-readable form are, in some sense, an adaptation or translation of a protected human-readable program. This matter will probably be resolved by the courts, at least at the trial level, in the near future.

The courts will, of course, be limited to finding either that there is no protection or that the full range of traditional copyright applies. They have no power to fashion a specialized form of protection.

Regardless of what decision the courts make, the result may not meet the needs of this new type of technology. If the courts find that there is no protection, producers of computer programs will have less incentive to produce them since their competitors will be able to copy successful programs at a fraction of the original cost and with far less risk. If the courts find that programs are protected by traditional copyright, the full range of rights and remedies will apply, many of which are inappropriate for this form of technology.

This section outlines a specialized regime of intellectual property protection for computer programs in machine-readable form that is designed to foster the creation and dissemination of such programs while attempting to minimize possible abuses of monopoly power or unnecessary litigation.

Since machine-readable programs need not be protected under the two copyright treaties to which Canada adheres, an entirely new regime can be created.

The status of computer programs in machine-readable form varies greatly from country to country. The United States was the first industrialized country to explicitly mention computer programs in its copyright legislation. The courts in other countries have come to varying conclusions on the existence of copyright in such programs. An Australian court recently found that copyright does not exist in computer programs, while courts in France and Japan have found that copyright does exist even though the copyright legislation in those countries does not mention computer programs.

Some of those cases may be appealed; also, the decisions of foreign courts with differently worded statutes or different legal traditions do not provide direct guidance on how the Canadian courts might rule on this issue.

Quite apart from court decisions, it appears that a number of countries are considering legislative amendments in this area.

There is no separate treaty dealing with computer programs and such a treaty is unlikely to be established in the near future. Computer programs are more likely to be dealt with under the existing copyright treaties, if at all, rather than in a separate treaty.

The scheme of protection to be provided in Canada will have the following components:

- A definition of computer program that applies to both human-readable and machine-readable programs.
- A section excluding machine-readable programs from the generally applicable rights in the Act (even if the courts hold that such works are not protected under the current Act, such an exclusion will be necessary because of the expanded definition of fixation and the fact that computer databases will be protected).

- A section creating an adaptation right in human-readable programs to create machine-readable programs.
- A section setting out the rights and remedies associated with machine-readable programs.
- A section setting out any special conditions or formalities applicable to the protection of machine-readable programs.
- A section setting out the status in Canada of machine-readable programs produced outside Canada.
- A section setting out transitional provisions. (These would apply if the courts find that computer programs in machine-readable form are protected under the current Act.)

The outline presented below is not a comprehensive statement of the scheme of protection as it will appear in the Act. It is intended only to depict the more important aspects of that protection.

Where there is no special provision dealing with computer programs in machine-readable form, the generally applicable rules of copyright law, statutory or otherwise, will apply.

### The Scheme of Protection

#### Definitions

- 1.1 "Computer program" will be defined in a manner such as "a set of instructions intended to operate a machine having information processing capabilities."
- 1.2 "Computer program in machine-readable form" will be defined in a manner such as "a computer program that is not intended for human comprehension," but will not include any instructions intended to make the program compatible with a particular machine or type of machine.

#### Computer programs in human-readable form

- 2.1 Computer programs in human-readable form will continue to be eligible for traditional copyright protection.

- 2.2 One of the rights attaching to computer programs in human-readable form will be the right to authorize a computer program in machine-readable form based upon it.
- 2.3 The right of a copyright owner to authorize (or prohibit) a machine-readable program based upon a published computer program in human-readable form will last for five years from the end of the year of creation of the human-readable program. After this time, any person with access to the program in human-readable form may use it to make a machine-readable program, which will not constitute an infringement of either the underlying human-readable program or of any other machine-readable program based upon that human-readable program.

Computer programs in machine-readable form

- 3.1 A computer program in machine-readable form will be eligible for computer program copyright.\*
- 3.2 Computer program copyright means the right:
- a) to publish the machine-readable program if it is unpublished;
  - b) to make another machine-readable program that is based upon and identical or substantially similar to the protected machine-readable program;
  - c) to make a human-readable program that is based upon and identical or substantially similar to the machine-readable program.

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\* Note: Computer program copyright does not include:

- a moral right (section 12(7) of the current Act);
- a public performance right;
- a broadcast or cable transmission right;
- a right of market segregation (import restrictions);
- a rental right;
- a right to use the program. (There is no right to use under traditional copyright law. For example, although it may be an infringing act to make a copy of a recipe in a book it is not an infringing act to bake a cake using that recipe.)

3.3 "Publication" means selling, leasing, licensing, trading, or offering to sell, lease, license, or trade a machine-readable program.

Fair use

3.4 There will be a fair use provision similar (or identical to) the provision proposed for works protected by traditional copyright.

Term of protection

4.1 The term of protection for an unpublished machine-readable program will be five years from the date of creation.

4.2 The term of protection for a published machine-readable program will be five years from the end of the year of publication.

4.3 If a machine-readable program is published more than five years after its date of creation, it will not be eligible for computer program copyright.

Infringement

5.1 It will be an infringing act with respect to a protected machine-readable program

- a) to do or authorize any act to which the owner of the program copyright has the exclusive right;
- b) to sell, lease, license, trade, import, or offer to sell, lease, license, trade, or import, or to authorize any such acts with respect to any machine-readable program that the alleged infringer knows or has reasonable grounds to suspect is an infringing copy.

5.2 Persons infringing a machine-readable program will be liable only for the remedies for infringement of computer program copyright regardless of whether the computer program copyright is still owned by the owner of the copyright in the underlying human-readable program.

Independence of human-readable and machine-readable programs

- 6.1 No act done with respect to a machine-readable program will be considered an infringing act with respect to the human-readable program upon which it is based.

Marking

- 7.1 All copies of a machine-readable program published with the consent of the computer program copyright owner shall be marked with c in a circle, the year of publication, and the name of the computer program copyright owner in such manner and location as may be specified by regulation. (Referred to as the computer program copyright notice.)
- 7.2 Regulations may require that the machine-readable program be marked in either or both of machine-readable or human-readable form, and that the object containing the machine-readable program be marked in addition to or in lieu of the machine-readable program.
- 7.3 Regulations will specify the nature of marking of a modified or updated machine-readable program where the computer program copyright owner is claiming an additional period of protection based upon the modification or updating.
- 7.4 It will be an infringing act with respect to a protected machine-readable program to remove, obscure, or alter the computer program copyright notice required by the Act.
- 7.5 It will be an infringing act with respect to an unpublished protected machine-readable program to add a computer program copyright notice without the consent of the computer program copyright owner.
- 7.6 It will be an offence (punishable by a fine) to intentionally remove, alter, or obscure a computer program copyright notice required by the Act, or to add an inaccurate computer program copyright notice for purposes of commercial profit or private financial gain.

International protection and national treatment

- 8.1 The protection outlined above will extend to nationals of all members of the Universal Copyright Convention

and the Berne Convention unless such countries explicitly exclude computer programs in machine-readable form from copyright protection.

- 8.2 Where any member states of the above conventions limit the term of protection for published computer programs in machine-readable form to a term of less than five years, the Governor in Council may limit the term of protection in Canada for machine-readable programs created by nationals of these states to a similar period. Similarly, where any member states limit the adaptation right in human-readable programs to a period of less than five years, the Governor in Council may limit that right to a similar period in Canada.
- 8.3 The Governor in Council may limit the protection given to machine-readable programs created by nationals of states that grant protection only to their own nationals, or which do not extend protection to Canadians on the basis of national treatment or reciprocal treatment, or which set conditions or formalities for the protection of machine-readable programs that are unduly onerous to foreign nationals and are inconsistent with the international intellectual property regime.

#### Transitional provisions

- 9.1 If computer programs in machine-readable form are protected under the current Copyright Act, and if a particular computer program in human-readable form is protected under that Act, the right to prohibit the making of a machine-readable program based upon that human-readable program will continue for five years after the coming into force of the new Act.
- 9.2 If a machine-readable program is protected under the current Copyright Act, it will be entitled to protection under the terms of the new Copyright Act for five years after it comes into force.



## CONCLUSION

The decisions of the government stated in sections I to XII of this paper are intended to meet the challenges and goals set out in the Introduction:

- to recognize and secure creators' rights in a communications era;
- to ensure that the basic principles of copyright legislation apply to technological developments;
- to provide new opportunities for growth in Canadian cultural, entertainment and information industries;
- to strike an appropriate balance amongst the various interest groups involved to ensure that creators are properly compensated while the efficient dissemination of information and ideas is assured.

In reaching its decisions the government has benefited from the many earlier comprehensive analyses relating to copyright revision. In particular, the work of the 1957 Ilesley Royal Commission, the 1971 Economic Council of Canada report, the Consumer and Corporate Affairs 1977 working paper "Copyright in Canada: Proposals for a Revision of the Law" and the more recent Copyright Revision Studies series, the 1983 report of the Department of Communications Task Force on Copyright and finally the 1982 Report of the Federal Cultural Policy Review Committee (Applebaum-Hébert report) have all played a role in shaping government policy. The many briefs and submissions received from and the meetings held with private sector interests have also helped to sharpen the government's awareness of the problems.

Every attempt has been made to find the most appropriate balance on each of the many important issues. The government is aware of the vast economic significance of copyright and the role it plays in providing the legal infrastructure on which business is carried out within the copyright industries. The revisions to the Act are intended to provide a basis for the further orderly development of those industries in Canada.

Decisions have also been made that will allow for the expanded usage of copyright societies. Rapid advances in

reproduction and communications technology have stimulated interest in having these societies operate in new areas.

Monitoring individual use is too costly to enable copyright owners to negotiate individually with users. However, copyright societies may be a solution. To provide the necessary balance between owners and users an expanded role for a revised Copyright Appeal Board is envisaged.

The overall purpose of the revisions outlined in this paper is to more clearly define the rights of copyright owners and the obligations of users in light of the technical complexities of today's communications technology. The government believes that the public interest is best served by clear delineations that remove ambiguities and meet the social and economic pressures resulting from technological development.

On a few issues the government has not taken final decisions, and public comment is sought in order to ensure that these issues are fully explored. The two major questions still to be resolved concern whether copyright liability should attach to cable and satellite retransmission activities and whether employees should have first ownership of copyright in works created in the course of employment. These are addressed in the following appendices.

Finally, it should be repeated that the purpose in issuing the White Paper is to expedite the legislative process by enabling interested parties to prepare themselves in advance of the introduction of the legislation to Parliament. The Parliamentary Committee on Communications and Culture will be conducting hearings on particular issues; briefs and submissions should be sent to the Committee.

## **Appendix I**

### **SHOULD COPYRIGHT LIABILITY ATTACH TO RETRANSMISSION?**

#### Introduction

This appendix sets out the factors to be considered in deciding whether to create liability for cable and satellite retransmission of copyright works. Its purpose is to present for public debate and discussion the elements of a controversial issue.

During the copyright revision process it became apparent that further consultation was required on whether compensation should be paid for the retransmission of copyright material. The divided opinions, together with the implications of liability for broadcasting policy, were prime factors in this decision.

These implications are not restricted to domestic considerations: Canada's international copyright responsibilities and commitments must also be borne in mind. These broader dimensions accentuate the need for the widest possible discussion of, and comment on, the issue.

Public policy considerations figure in the debate as well. These include the need to encourage creativity and cultural development, consumers' needs for access to programming, and the importance of copyright for industries based on these exclusive rights.

#### The Issue

The new Copyright Act will grant copyright owners the right to communicate their works through cable and satellite origination of programming, such as Pay-TV.<sup>1</sup> Origination

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1. The decision in Canadian Admiral Corporation Ltd. v. Rediffusion, Inc., post, can be interpreted as creating immunity from copyright liability, in respect of origination. Similarly, the decisions in Lougheed and Shellbird that satellites are artificial guides could be interpreted against copyright owners. See Regina v. Lougheed Village Holdings Ltd., 58 C.P.R. (2d) 108, and 59 C.P.R. (2d) 107; and Canadian Radio-Television Commission v. Shellbird Cable Ltd., 60 C.P.R. (2d) 215.

is considered to be analogous to the function performed by a broadcaster.

No decision has been taken on whether copyright liability should be imposed for the retransmission (by cable, satellite and other means) of off-air local and distant signals. Here, the focus is narrow: to come within the term "retransmission," the copyright work must be contained in an off-air broadcast signal, and the signal must be delivered to viewers by an organization other than the original broadcaster. The signal delivery method is irrelevant: it can be relayed over vast distances by microwave or satellite, rebroadcast, or simply picked up off the air by a cable head-end and retransmitted.

It is also possible, however, to retransmit non-broadcast signals. One example is the simultaneous retransmission of cable system programs that were intended for a particular subscribing audience. This activity, which has not been addressed in the views put forward to the government, constitutes the retransmission of copyright material. Therefore any discussion about imposing copyright liability on retransmission should take into account copyright works in both broadcast and non-broadcast signals.

The following addresses only the issue of the retransmission of copyright works in broadcast signals. However, comments are invited on the retransmission of programming by non-broadcast signals as well.

Radio and television signals are retransmitted under several sets of circumstances.

The community function. In this situation, a cable system operates in an area where reception is poor and provides subscribers only the signals of local stations that they would not ordinarily receive. The function performed is merely the perfection of the broadcaster's market. This is sometimes termed the "local signal area" or the "service zone" of the broadcaster - the area within which local broadcasts are intended for direct reception by the public.

The fill-in function. This retransmission activity uses cable and satellite methods to provide service for areas outside the broadcast range of any station. When it does not displace present or future local stations, such a system performs a supplementary function. Canadian Satellite Communications Inc. (CANCOM), for example, is licensed to serve remote northern communities lacking local broadcast or cable service.

As technology develops, satellite delivery will accomplish this function with increasing efficiency and decreasing expense. For example, cable service to small communities near larger metropolitan centres has been uneconomical, and these small communities cannot support a local broadcast station. Satellite delivery renders retransmission service to these areas more feasible and increases the value of this fill-in service.

The distant signal function. This retransmission activity operates in areas where quality and diversity of reception are already satisfactory. The system imports one or more distant station signals to increase the available channel selection.

#### The Present Law

Cable retransmission of broadcast signals incorporating copyright works does not infringe copyright. In Canadian Admiral Corporation Ltd. v. Rediffusion, Inc.,<sup>2</sup> the court found that a cable system's simultaneous retransmission of a copyright work in a broadcast signal to individual homes was not an infringement of copyright as it was not a "radio communication"<sup>3</sup> or a "public performance" of the work. The present law does not require Canadian cable or satellite retransmission systems to pay either the copyright owner for the use of the work, or the broadcaster for the use of the signal embodying the work.<sup>4</sup>

It may be argued that the 1954 decision is not relevant today. However, no appeal was taken from the decision and, more importantly, the issue of today's more sophisticated operations has not been litigated. The real ques-

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2. [1954] Ex. C.R. 382.

3. The Broadcasting Act; 1970, R.S.C. c. B-11, section 2 and the Interpretation Act; 1970, R.S.C. c. I-23, section 28: any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves or frequencies lower than 3,000 gigacycles per second propagated in space without artificial guide.

4. "Broadcasting" is defined in section 2 of the Broadcasting Act as: any radio communication in which the transmissions are intended for direct reception by the general public.

tion now is not whether the present law was correctly interpreted but whether the revised law should impose liability.

### The International Copyright Conventions

The international copyright conventions<sup>5</sup> by which Canada is bound must be considered. By acceding to a convention, a state undertakes to honour its provisions in accordance with that state's interpretation of the convention.

The Berne Convention is a "national treatment" convention. Each member country gives the protection of its own law to nationals of other member countries. It has been revised several times to increase levels of protection. Canada is presently bound by the Rome Text (1928), which does not require protecting works against retransmission. The text does recognize the right to "broadcast," in wording that reflects the state of the broadcasting industry in 1928. The particular wording is in Article 11 bis:

Authors of literary and artistic works<sup>6</sup>  
shall enjoy the exclusive right of  
authorizing the communication of their  
works to the public by radio-communica-  
tion.

In 1948 the right was subdivided into three facets, and the Stockholm (1967) and Paris (1971) revisions maintained the provisions. These texts are based on the premise that there should be compensation for additional use.

The texts first require granting the right to authorize the broadcasting of a work by television or radio. Copyright liability attaches to the act of emitting the signal, whether or not that signal is received. The second right governs the use of the broadcast signal. The copyright owner has the right to authorize any further communication of the broadcasted work to the public if the further communication is made by an organization other than the original one. Specific mention is made of communication by

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5. The Berne Convention for the Protection of Literary and Artistic Works (1886), revised at Berlin (1908), Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971), and the Universal Copyright Convention (UCC) (1952), revised at Paris (1971).

6. This generic phrase encompasses a large number of works, including musical and cinematographic works.

wire (a cable system) and of rebroadcasting. The third right is to authorize the public communication of the broadcast by loudspeaker or on a television screen.

All texts include a provision allowing the rights to be subjected to compulsory licensing,<sup>7</sup> providing such licences do not prejudice the author's moral rights or the right to obtain equitable remuneration, which must be fixed, failing agreement, by the competent authority.

The Universal Copyright Convention (UCC) is also a "national treatment" convention. The 1971 revision<sup>8</sup> of that Convention does make reference (in Article IV bis) to granting the rights of broadcasting and public performance. Notably, the text does not define either right; nor does it offer any guidance as to the scope and extent of the rights. Canada adheres to the 1952 text, which is silent with respect to "broadcasting."

Opinions vary on the interpretation and application of these conventions at the national level. As described in the "other jurisdictions" section of this appendix, countries differ widely in the recognition of retransmission rights and the implementation of those rights. There is, moreover, an additional complication.

The later texts' differentiation of rights assumes the existence of an original broadcast, then a further communication by wire or a public communication by speaker or screen. As the World Intellectual Property Organization (WIPO) Guide to the Berne Convention states, "opinions differ...whether the transmission of a signal to a satellite intended, with the aid of an earth station, for public distribution constitutes broadcasting within the meaning of this Article."<sup>9</sup> The Berne Convention does not define "broadcasting," thus leaving the question open. The Guide states, without Convention authority, that "the meaning of broadcasting is found in the Radio-communications Regulations: it is a matter of transmissions intended to be received directly by the general public."<sup>10</sup>

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7. Article 11 bis (2).

8. Paris (1971), which came into effect July 10, 1974.

9. Guide to the Berne Convention, WIPO, Geneva, 1974.

10. Ibid. at 67.

The preponderance of opinion is that the Berne Convention does not, in its references to "broadcasting," deal with communications satellites. In fact, a new convention was adopted in 1974 in an attempt to deal with certain aspects of this matter: Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels Satellite Treaty).

It is clear that the 1928 Berne Convention obliges Canada to grant a radio communication right but not a retransmission right. This is demonstrated by the 1948 broadening and elaboration of the right into three elements and the provision, for the first time, of a cable retransmission right.

However, if copyright liability is imposed on the retransmission of Convention works, it is clear that under the national treatment requirement, the right must be accorded to foreign works coming within the Convention and protected by Canadian law. The principle requires that a member country provide the nationals of all other member countries the same rights provided to its own nationals for all literary and artistic works. It is also a principle of international copyright that reciprocity of treatment cannot be required.

If Canada granted a retransmission right, it would be immaterial whether or not Canada accedes to a later text under which it would be required to do so. Moreover, if Canada did grant a retransmission right for protected works without accession to later texts, the right could be subjected to conditions other than those set out in the 1971 Berne text mentioned earlier.

As Canada is not required to provide the right, it could not be expected to observe the limitations or exceptions imposed by the 1971 text. For example, Canada could grant the right, either in full or in part, and subject its exercise to a compulsory licence without requiring that there be failed negotiations before remuneration is fixed "by competent authority."

The prevalent opinion is that the 1971 texts of the UCC and Berne do not deal with satellite retransmissions. A fortiori, the Berne 1928 and the UCC 1952 texts also do not deal with satellites, and Canada is not bound by the Brussels Satellite Treaty. Being free of membership (and therefore obligations) in any international intellectual property instrument dealing with satellites, Canada may envisage a wide variety of options in exercising its freedom.

### Canadian Studies

Several reports and studies have addressed the issue of retransmission rights, but over time some have become less relevant to the issue as now defined. For example, the Ilsley Report<sup>11</sup> dealt primarily with a cable system retransmitting within one community the signals of a local broadcaster, a somewhat rudimentary situation today. The Report of the Economic Council<sup>12</sup> and Copyright in Canada<sup>13</sup> did not directly address the use of satellites for the long-distance retransmission of broadcast signals.

Ilsley Royal Commission. The Ilsley Report opposed the imposition of copyright liability on the ground that the copyright owner should not be entitled to prevent an authorized broadcast of a work from being retransmitted by a cable system. The Commission felt that as the copyright owner's royalty for the broadcasting of the work was based on total audience size, an additional fee was unjustified.

Report on Intellectual and Industrial Property. In 1971 the Economic Council of Canada opted for a system of compulsory licences whereby, in the Council's opinion, both public access and private compensation could be ensured. Specifically, it recommended that cable systems not pay copyright royalties for simultaneous retransmission of broadcast signals, providing the signals were not changed. However, copyright liability should be imposed where the broadcast signal contained no advertisements, or where the cable system deleted or substituted advertisements, or where the signal did not originate with a wireless operator.

Copyright in Canada: Proposals for a Revision of the Law. This report recommended that liability be imposed on cable systems for the retransmission of Canadian broadcasts containing Canadian copyright material. Canada is a net importer of copyright material. To avoid copyright royalties leaving the country, the report proposed the grant of a retransmission right to Canadian broadcasters for Canadian broadcasts.

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11. Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs: Report on Copyright (Ilsley Report) (1957).

12. Economic Council of Canada (1971).

13. A.A. Keyes, C. Brunet, Copyright in Canada: Proposals for a Revision of the Law (1977).

The authors were of the view that the proposal did not violate the national treatment provisions of either the Berne Convention or the UCC, as broadcasts were not subject matter of protection under the conventions. The proposal avoided the administrative problems of dealing with multiple copyright owners and further aggravation of the copyright imbalance of payments.

Copyright Obligations for Cable Television: Pros and Cons. This study<sup>14</sup> examined the economic justification for imposing copyright payments on cable systems for retransmission of broadcast signals. The major finding was that cable systems increased advertising revenues for broadcasters and, since the compensation that creators negotiate with broadcasters should also benefit from the increased markets, copyright payments were unjustified.

The study concluded that the key assumption behind each liability proposal was the belief that cable systems reduced broadcasters' advertising revenues, and thus their copyright payments. In each case, the motive behind the copyright proposal was to return copyright payments to the level that would apply if there were no cable systems.

The paper estimated the impact of cable systems on broadcasting revenues, noting that cable systems influence broadcasting revenues in such ways as through "market fragmentation." Viewers who have access only to station X will have many more stations to watch when cable service is introduced, and station X's share of local audience will drop. This fragmentation is thought to reduce advertising revenues because advertisers in a given locality might not value distant viewers as much as they value local viewers.

The study assessed the potential impact of fragmentation by measuring the relative values of local and distant viewers to advertisers. Statistical techniques were used to determine the average advertising rate per person for distant and local viewers. In general, local viewers are worth twice as much as distant viewers. The study also estimated the possible decrease in advertising revenues.

The study found, however, that cable systems are also likely to have a positive effect on advertising revenues, which may or may not counteract the impact of market fragmentation. Since cable increases the choice of programs

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14. S.J. Liebowitz, Copyright Obligations for Cable Television: Pros and Cons (1980).

available to viewers, and since they are willing to pay for cable service, cable appears to make television a more attractive entertainment medium. If viewers value television more or watch television more intensely, or some combination of these two behavioural changes, advertisers will pay more to reach the total television audience.

The report measured these changes in viewing habits in terms of the extent to which cable increases viewing intensity and therefore advertising revenues, estimating that cable is responsible for a 19.6 per cent increase despite any influence of the local/distant audience relationship.

This finding is the key result of the study. It is contrary to the assumptions made by those who have proposed the imposition of copyright payments because they focused only on market fragmentation.

The report offers additional evidence to support this finding. Examination of trends in advertising revenues does not indicate a negative impact of cable. Interprovincial differences in advertising rates are shown to be positively related to cable penetration. There seems to be no economic justification for the theory that broadcasting revenues are decreased by cable.

Task Force on Copyright. In July 1981 the Minister of Communications, the Honourable Francis Fox, established a Task Force<sup>15</sup> to advise him in copyright matters. In January 1983 the Task Force submitted a comprehensive report on many of the issues of revision. The report argued that copyright owners should have control over cable television and satellite retransmission of their works because it is inequitable to permit anyone to appropriate the value earned by the labours of another. Those who are in the business of using another's intellectual property should pay for such use.

Federal Cultural Policy Review Committee Report. This report<sup>16</sup> did not discuss copyright protection in any detail, choosing instead to articulate the principles that the committee believed should be used in revising the law. With respect to cable and satellite retransmission, the committee

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15. A mixed group of departmental officials and private sector individuals, including C. Brunet, J. Hylton and A. Raynauld.

16. Report of the Federal Cultural Policy Review Committee, 1982.

asserted that the basic rights of creators to own and control their works should be guaranteed and that provision should be made for proper compensation.

### Other Jurisdictions

Many jurisdictions have not dealt with retransmission rights to any great extent. However, a lack of protection does not necessarily follow from the fact that the law of a particular jurisdiction makes no express reference to the issue. Many laws protect authors' rights very broadly, and the courts may interpret such laws as encompassing retransmission.

Those few jurisdictions that have addressed the issue have adopted or proposed a variety of solutions. The following descriptions of the positions taken in other jurisdictions are not presented as being potential solutions to Canadian needs. Although valid in their specific context, they may not be appropriate for Canada's social priorities or regulatory and cultural policies.

United States of America. As a result of compromise between cable and copyright owners, the 1978 revision of the United States copyright law provides for compulsory licensing of copyright material contained in broadcast programs retransmitted by cable systems.

The committee<sup>17</sup> considering the law felt that cable systems carrying copyright material should pay royalties. The committee decided upon compulsory licensing "for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry." The solution was primarily aimed at imposing liability for the retransmission of distant non-network programs, not for local or network programming.

American cable systems are required to pay a percentage of their receipts into a central fund to be divided among copyright owners of record. Rates, initially set by law, are subject to periodic review by a Copyright Royalty Tribunal.

The American law extends its compulsory licensing system to encompass Canadian and Mexican signals. The

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17. Report from the Committee on the Judiciary, submitted to the House of Representatives, September 3, 1976; 94th Congress, 2nd Session; Report No. 94-1976.

licence enables American cable systems to retransmit Canadian broadcast programming, providing the cable system is located within 150 miles of the border, or south from the border to the 42nd parallel of latitude, whichever is the greater.

Japan. Japan also uses the compulsory licence mechanism. Article 68(1) of its 1978 copyright law provides for a compulsory licence for the broadcasting of works in accordance with the provisions of the 1971 Berne text. Article 68(2) states that broadcast works can be retransmitted by wire if the copyright owner receives compensation equivalent to the ordinary rate of royalty.

Austria. The Austrian 1980 copyright law regards retransmission by a "community antenna system" as part of the original broadcast. However, when foreign broadcasts are retransmitted the author of the work must receive "equitable compensation." The claim for compensation must be made by "collecting societies," and its amount is determined according to three criteria:

- the economic implications of retransmission for the authors;
- the economic benefit of retransmission accruing to the person effecting it, with due regard to the number of broadcasts that can normally be received, with the aid of conductors, simultaneously in one household; and
- the amount that authors receive for comparable use in the state in which the original broadcast was transmitted.

Only foreigners are entitled to compensation; Austrians are subject to a complete retransmission exemption.

United Kingdom. Sections 2 and 3 of the 1956 Copyright Act provide copyright owners with, inter alia, the exclusive right to authorize the "diffusion" (transmission) of material. Pursuant to section 40(3), however, owners are assumed to have granted a retransmission licence to the original United Kingdom broadcaster, the rationale being that it would be inequitable to make additional payments for the same transmission.

The section does not apply to the retransmission of foreign broadcasts embodying protected material. However, section 28 limits the owners' claims to compensation for the additional audience reached by means of retransmission.

Australia. In 1980 the Australian government ordered an inquiry into the copyright and related issues arising from the introduction of cable and subscription television service. Since the 1968 Australian copyright law does not cover the new developments in retransmission systems, the inquiry's report<sup>18</sup> proposed several amendments to the law:

- Where a cable system is required to carry a local signal, access to copyright works in that local signal should be compulsory.
- Where a cable system has a statutory obligation to retransmit local signals, copyright liability would not attach to those retransmissions.
- Where a cable system voluntarily retransmits either a local or distant broadcast signal, the copyright owners of the material broadcast should receive voluntarily negotiated compensation.

It is understood that the satellite retransmission of broadcast signals would be treated as coming within these recommendations.

Belgium. Pursuant to successful litigation in Belgium, copyright owners have entered into a voluntary agreement with Belgian cable systems concerning the retransmission of copyright material. The agreement, of September 1983, operates retroactively from July 1, 1983 to December 31, 1988 and provides that cable systems will pay 15 per cent of revenues from cable subscribers to copyright owners.

The 40 cable systems are to pay for broadcasts originating in Belgium, Great Britain, Holland, France, Germany and Luxembourg. Cable systems must carry the broadcasts simultaneously and without alteration, additions or substitutions.

#### Positions of Interested Parties

The following section attempts to outline the positions taken by those directly interested in a decision on the copyright issue. In general, copyright owners seek to end the present unpaid use of their property; broadcasters

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18. Cable and Subscription Television Services for Australia, 1982, Vol. 2: Report (Part B), at 12.67.

perceive unpaid retransmission as unfair; and retransmission systems argue against liability on various grounds.<sup>19</sup>

The copyright owner. Copyright owners argue that the primary object of copyright is to grant creators an exclusive property right to authorize or prohibit use of material, and to receive compensation for such use. The use of the creator's property without authorization or payment offends the purpose and principles of copyright law. Copyright owners allege that retransmission seriously diminishes copyright values and affords the operators of such systems a competitive advantage over television stations, which must pay for the right to broadcast.

Copyright owners further contend that retransmission is undermining program exclusivity. Owners usually license their programs in each market separately: the Ottawa market, for example, will be licensed independently of the Montreal market. An Ottawa cable system could import from a Montreal broadcaster programs that had not been authorized for release in Ottawa, thus depriving the copyright owner of a first-run market.

Where a local television station and a cable system compete for the same local market, copyright owners have difficulty selling the local station programs that the cable system has already imported. Even where there is no local television station, cable operators' unlicensed use of programs still deprives copyright owners of revenue, as the possibility of licensing that market in the future has been lost, or at least seriously diminished.

Copyright owners reject the view that their losses can be met by charging higher fees to television stations whose programs are or may be carried by a retransmission system. There is no reason why a television station should act as a bargaining agent for the retransmission operator. Further, television stations are unwilling to pay higher fees for various reasons.

- Television stations that are not "super-stations" are unwilling to pay for programs shown outside their markets.

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19. The arguments summarized herein are drawn largely from the hotly contested American Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, H.R. 89th Congress, 1st Session, Serial No. 8, Part 2(1965) (hereinafter cited as Subcommittee Hearings) and from briefs and submissions made to the Canadian government.

- Local advertisers are unwilling to pay for advertising in a market where there are no facilities to sell their products or, alternatively, no customers to buy them.
- The advertiser of a national product whose advertisement is shown on a distant station and also imported into a local market on cable will not pay the local broadcaster again for the same exposure.

Copyright owners contend that they will not receive double payments in the distant, duplicated market because cable subscribers are not included as viewers in the fees they receive for the program material. Indeed, copyright owners frequently receive no payment at all. Local stations may not be launched because of their financial inability to compete with retransmission systems. Copyright owners might be also unable to sell to large city markets where cable has brought in, or will bring in, the owners' programs. They claim that imposition of copyright liability on retransmission systems would result in payment, but not double payment.

In the view of copyright owners, the financial backer of a production is entitled to a fair price for any and all use of that program, regardless of the type of user or how the program is delivered to the viewer. Retransmission systems should pay like any other class of user. Currently, the cable industry can sell its subscribers programming that it obtains without royalties.

Copyright owners point out that a cable system provides a diversified program service, not an antenna service to improve program reception. The cable system receives and transforms a broadcast, then pipes it, at a profit, to the subscriber. The system brings in a clear signal not intended to be received in that market. The fact that the broadcaster distributes programs through the air, the cable system by wire, and the satellite by up-and-down linking, cannot change their basic functions: all are distributors of programs.

Copyright owners argue that anyone who wants to use their property must assume full responsibility for obtaining an appropriate licence. They maintain that since broadcast schedules are made up well in advance, cable systems could learn which company controls a program's distribution rights in time to obtain the appropriate licence.

The view that imposition of copyright liability would render retransmission systems a captive market is, in the copyright owners' opinion, without merit. Ordinary market

forces are the appropriate criteria to apply to retransmission systems. Competition legislation is the appropriate vehicle to deal with anti-competitive conduct, if and when the problem arises. With a willing buyer and many willing sellers in a highly competitive industry, there is no difficulty in providing the notice and clearance required.

The arguments have centred on the retransmission of television programming with minimal reference to the use made of other copyright material, such as music, which is an important element of programming. Broadcast stations use music in two ways: in radio as programming per se, or in the sound portions of films or videotapes. Both uses require the payment of copyright fees, pursuant to the exclusive right to authorize the radio communication of musical works.

Owners of copyright in music advance the same general arguments about the retransmission of broadcasts of their works as do other copyright owners. Accordingly, they conclude that compensation should be paid for retransmission activities.

Broadcasting organizations secure in advance an annual licence, at rates determined by the Copyright Appeal Board, permitting them to broadcast musical works, whether used as programming or otherwise. Thus there is no question of program exclusivity or markets. The two organizations representing owners of copyright in music urge the extension of copyright liability to retransmissions, with the process of payment being brought within the existing scheme provided by the Act.

The broadcaster. The broadcaster's licence, with its restrictions on geographical territory<sup>20</sup> and airing time, prevents any program from being broadcast in other markets. Broadcasters argue that program exclusivity is essential because advertisers are unwilling to pay as much (or at all) for a program already shown or simultaneously shown in the same market. The development of the cable industry, and more recently of satellite retransmission services, has weakened the advertising base of the broadcasting industry, and will continue to do so unless cable and satellite systems are required to pay their fair share.

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20. The station's territory is limited by the antenna height and power.

A retransmission system picks up the signal of the distant station, which has paid for the broadcast rights to the copyright material, and sells it to its subscribers, sometimes in competition with a local station. The broadcaster views this competition as unfair to:

- the distant station, because the retransmission system has free access to material that the distant station has paid for;
- any local non-network station that has bargained and paid for exclusive rights in the local market that it is not actually getting;<sup>21</sup>
- any local network station, for though it does not pay for the programming it is affected by audience fragmentation and the refusal of the network advertiser to pay for coverage on network stations that are not the exclusive outlet for the program; and
- copyright owners, because they receive no compensation for the retransmission of the program.

Encouraging the development of local broadcasting is a primary objective of Canada's broadcasting policy. Audience fragmentation, according to the broadcasting industry, is attributable to cable television penetration of broadcast markets, which has reduced advertising revenues. This fact, together with the unfair competitive situation, has limited the economic feasibility of local broadcast undertakings. The imposition of liability on cable operators would help equalize the competitive status of the industries concerned.

Broadcasters, like copyright owners, maintain that in general the technological mode of transmission, be it Hertzian wave, coaxial cable or satellite, should not make any difference to the copyright status of the works being distributed.

The broadcasting industry supports the argument that normal industry practices of program licensing should be applied for retransmission activities. Broadcasters are able to arrange clearances in advance, without the necessity

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21. The simultaneous substitution provisions may alleviate this problem, but the solution is temporary and does not give the station the program exclusivity for which it has bargained. See Cable Television Regulations, CRTC, c. 374, s. 19.

of being granted any particular exemptions. If cable systems could not obtain clearances, those programs would have to be deleted.

Retransmission System Operators. Operators assert that they are not engaged in broadcasting. Television stations originate programs produced by them or obtained from a variety of sources. Retransmission systems, in contrast, function only as a receiving device for broadcast signals. They do not select programs, nor do they charge for them. They do not solicit advertising, nor do they sell time. They only receive signals intended for public reception. The cable system merely provides an antenna and a working connection from the antenna to the viewer's receiver.

The industry maintains that its function is the equivalent of a master antenna rented to subscribers, except that a connection makes the antenna available to a community rather than an individual or small group. The owner of a master antenna should be no more subject to copyright liability than is the person who installs a roof-top antenna for a private home. The function of receiving and amplifying the off-air signals remains the same. A retransmission system, in providing an instrument for television reception, is not in the business of selling or using copyright material.

The industry alleges that the copyright owner and the broadcaster receive greater royalties and advertising revenues because of the existence of retransmission systems.<sup>22</sup> As revenues of both are a direct function of audience size, the retransmission system, in expanding audience size, increases these revenues. Operators maintain that the addi-

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22. Evidence adduced at the U.S. subcommittee hearings showed that the broadcaster sought out cable systems in order to increase its viewing audience and consequently its advertising revenue. In these circumstances, it was argued for the existence of an implied licence for cable systems to receive that station's signal. Subcommittee Hearings, Supra at 1281-87, 1302-06.

tional viewers are anticipated in the fees charged by the copyright owner to the broadcaster<sup>23</sup> and by the broadcaster to the advertiser, for they are based on audience size. Imposing liability on retransmission systems would, therefore, result in double payment.

Operators also argue that the lack of an exemption from copyright liability is inconsistent with CRTC regulatory and licensing decisions. With the imposition of liability, copyright owners could have the right to withhold use of programs. This would create a conflict with the compulsory carriage requirements for cable systems and the conditions of licence imposed upon satellite delivery systems.

For example, the CRTC decision awarding a licence to CANCOM for the extension via satellite of service to remote and under-served communities specifies the Canadian signals to be used. The decision<sup>24</sup> states that "with respect to the arrangement for distribution of its service CANCOM is required to enter into an affiliation agreement with all broadcasting undertakings for the carriage or transmission of this service and to file such agreements with the Commission." The 1983 CRTC decision<sup>25</sup> to permit CANCOM to carry the three American networks plus one public broadcasting service essentially places CANCOM under the same regulatory regime as a cable system. If permission is withheld by a copyright owner, the retransmission system cannot do as the CRTC requires, either by regulation or by conditions of licence.

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23. Royalties for the use of music by private broadcasters are calculated as a percentage of gross revenues. The Copyright Appeal Board's royalty calculation for the CBC, however, is based on Canada's total population and not gross revenues. Royalties for the use of other copyright material are not always based on gross revenue in which the copyright owner can share. See 1977-78 Annual Report of the Canadian Broadcasting Corporation 42-43.

24. CRTC 81-252, April 14, 1981.

25. CRTC 83-126, March 8, 1983.

The CRTC wishes to integrate retransmission systems into the overall Canadian broadcasting system.<sup>26</sup> For this reason cable systems are required to retransmit the signals of local television stations within the community in which the cable system operates.<sup>27</sup> This means that the cable system has no choice over the retransmission of some signals.

If copyright liability were imposed and the cable system was unable to pay the copyright owner's price, or was refused clearance, it would have the choice of infringing the copyright law by retransmitting the signal without clearance, or of violating the CRTC regulation by not retransmitting the signal. Although satellite retransmission systems are not required to retransmit local signals, they must retransmit specified Canadian broadcast signals, and the same rationale applies.

Operators argue that requiring clearances would pose serious practical problems. A retransmission system is unconcerned with the actual program content of the signal it retransmits. It does not know whether a program is protected by copyright, or the identity of the copyright owner, and it cannot ascertain the broadcast content in sufficient time to negotiate a clearance. Many individuals and organizations hold copyright in the programs retransmitted. It would be impossible to identify and obtain clearances from literally hundreds of copyright owners. Because retransmission systems, unlike broadcasting stations, do not control program content, the practice of copyright licensing is inapplicable.

#### The Larger Whole

As stated, the government has not taken a decision on the retransmission issue. The present law, at best, does not address the issue directly. If Canada remains at its present level of international participation (subject to the major consideration of the national treatment provisions) it is free to consider a wide variety of choices in imposing and implementing liability, should the government decide to do so.

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26. Canadian Broadcasting a Single System (CRTC Policy Statement, July 16, 1971).

27. Cable Television Regulations, CRTC, c. 374, s. 6(1).

The reports and studies mentioned above varied in their recommendations on liability. The extent to which the issue has been dealt with in other jurisdictions varies similarly. The positions adopted by those interests directly affected are polarized between the imposition of, and an exemption from, liability.

The retransmission issue has so far been addressed in the narrow context of its copyright aspects, but clearly any decision will be made within the larger context of general policy. In particular, copyright law revision must interact with cultural and communications policy. Because the imposition of copyright liability could affect Canada's communications system, public policy requires that the question of entitlement be approached from a broader perspective than that of the parties directly affected.

Undoubtedly copyright revision is part of the "larger whole" mentioned in the Broadcasting Strategy<sup>28</sup> in relation to cultural development. That strategy, in referring to the creation and transmission of information, stressed the technical capacities of present and existing systems.

However, the process of communication begins with the creation of program content by individuals and corporate entities interested in economic exploitation of their programs. In pursuit of that objective, they are concerned about the means by which they can control and market these programs. A wide range of creators - composers, performing rights societies, film makers and sound recording organizations - look to copyright legislation as the legal basis for exploitation of their work, and the exact nature and scope of these rights are of crucial interest.

The Broadcasting Strategy has as one of its objectives the expansion of program choice by broadcast, cable and satellite means, "to make available to all Canadians a solid base of attractive Canadian programming...through the development of strong Canadian broadcast and program production industries."

To that end the government announced the establishment of "a special Canadian Broadcast Program Development Fund to assist private production companies and independent producers." On July 1, 1983 the government imposed a 6 per cent tax on "programming services" that was levied on cable and Pay-TV subscribers.

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28. Towards a New National Broadcasting Policy, Ottawa, March 1, 1983.

The cable industry alleges that the collection and payment of the tax amounts to paying for the use of programming and the funding of Canadian production. In their view payment of a copyright retransmission royalty would be tantamount to double payment for programming.

Copyright owners, however, do not consider the tax as compensating for the retransmission of their works. They believe the collection of revenue based on an unpaid use to be inequitable in that the beneficiaries of the revenue, future Canadian program producers, are not those whose works are being used to generate the fund. Owners term the tax a cross-subsidization scheme because the (unpaid) use of their works is being taxed to serve the interests of another group. In short, copyright owners are subsidizing the production of future Canadian programming.

Revision of the copyright law provides the opportunity to ensure that the policy behind the new legislation, by striking a balance between creators and users, is in accord with other government priorities.

Cultural and communications policy formulation must reflect a balanced perspective that transcends the vested interests of the parties involved. The public interest in the area of communications policy is integrating retransmission systems into the Canadian broadcasting system, developing local broadcast service and encouraging both quality and quantity in Canadian program production. The imposition of copyright liability for retransmission must be considered in the light of these objectives, along with those for cultural policy.

The development of an indigenous Canadian culture is a function of the degree of encouragement and protection afforded copyright material. The question of whether cable systems should pay copyright royalties must be answered by taking into account all these factors.

### Options

Having outlined the viewpoints of the most affected parties and the public policy environment in which the issue should be resolved, it is possible to consider general options. The principle of imposing liability is separate from that of determining the amount of compensation, which is simply a matter of choosing an appropriate mechanism if necessary. If Parliament decides not to provide a retransmission right under the Copyright Act, the new Act must explicitly state this in order to avoid litigation.

If liability is imposed, the decision can be implemented in several ways. Copyright owners' exclusive authority over the retransmission of their works could be unrestricted in its exercise or be made subject to certain limitations.

In general, the owners of an exclusive right have the unrestricted ability to exercise the right, for instance to permit or deny the retransmission of their works. Traditionally, however, copyright exclusive rights have never been unrestricted; there are limitations governing the duration, scope and exercise of the rights.

Public policy may require that the grant of a right be subject to general restrictions for the public good. One such consideration may be CRTC regulatory requirements. As cable systems are required by CRTC regulation<sup>29</sup> to "distribute" the signals of local stations, copyright legislation should not permit the copyright owner to prohibit such distribution. This would not only create a conflict between the CRTC regulations and the Copyright Act, it would also place cable systems in a poor bargaining position.

The same situation applies to retransmission by satellite. The CRTC approves a licence to distribute, via satellite, certain broadcast signals, some of which may be in the "must-carry" category. A retransmission operator who cannot obtain the copyright owner's permission to retransmit an obligatory signal would be outside the terms of its licence. Therefore compulsory access to must-carry signals should be permitted, without implying that the activity must be free of copyright compensation.

With respect to other transmitted signals, two matters must be considered. First, should compulsory access to retransmission be allowed for reasons other than regulatory necessity? One kind of compulsory access provision permits the use of the copyright works contained in the signal without prior permission, provided that the prescribed compensation is paid to the copyright owner. Other alternatives include an exclusive right and an arbitration mechanism. The former would create open negotiation between owner and user and would include the right to prohibit the use of the program. The latter would provide compulsory access only in the event an agreement could not be reached.

The second matter to be addressed is the amount of compensation. An arbitration mechanism, requiring negotia-

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29. CRTC, c. 374, s. 6(1).

tion of the amount of compensation, could be used. If an agreement could not be reached, an independent authority could be mandated to establish the amount. This mechanism could be used for must-carry signals as well as for all other retransmitted signals.

It also appears that free exercise of a retransmission right could apply to all retransmitted signals not designated as must-carry signals. Under this system, copyright owners would possess an exclusive right to retransmit their works. If an agreement could not be reached with a retransmission system, the copyright owner would prohibit the retransmission. The drawbacks of this scheme are high transaction costs and the possibility of refusal to permit retransmission.

Alternatively, the government could establish a compulsory licence system that would specify a royalty based on such formulas as:

- a percentage of retransmission revenues, with the rate established (and periodically reviewed) by statute, or by the Copyright Appeal Board;
- the number of subscribers times the number of must-carry retransmitting channels, with rates established by the same means.

Such a mechanism could entail administrative costs and delay. Additionally, the establishment of a statutory rate based on the above examples would not necessarily reflect the market value of the copyright material.

With respect to non-broadcast retransmission, such as Pay-TV or local cable programming, the considerations differ. Programs directed by the originator to paying subscribers are not intended for reception by the general public. This essentially private arrangement does not involve the public policy considerations applicable to the retransmission of public broadcast signals.

### Summary

This appendix has set out the nature of the issue and some of the factors bearing on its resolution in order to elicit comments and suggestions that will assist the government in making a decision. While comment, public debate and response on any aspect are welcome, the following are of particular interest, and it is hoped they will be addressed.

Principle of liability:

- Should liability be imposed and, if so, should liability extend to all or only some retransmission activities?
- If liability is to extend to only some retransmission activities, what should those particular activities be?
- What differentiation, if any, should be made between the retransmission of broadcast and non-broadcast signals?

Scope of a retransmission right:

- Should any right of retransmission be unrestricted, subject to prior negotiation between copyright owners and retransmission systems?
- Should any right be subject to compulsory access, and, if so, for what signals: local, fill-in, distant?

Determining the amount of compensation:

Assuming compulsory access to some signals,

- should compensation be determined by negotiations, with compulsory arbitration by the Copyright Appeal Board if necessary; or
- should compensation be determined by the Copyright Appeal Board in the first instance, pursuant to statutory provisions?

## Appendix II

### FIRST OWNERSHIP OF COPYRIGHT IN WORKS CREATED BY EMPLOYEES IN THE COURSE OF EMPLOYMENT

This appendix discusses the issue of first ownership of copyright in works created by employees in the course of employment and invites public comment.

Section 12(3) of the current Copyright Act states

Where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright; but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical.

A wide variety of protected works are created by employees: internal memoranda, letters, computer data bases, sound recordings, films and newspaper stories. An employee may be hired solely to create works (journalists, editors, draftsmen) or those works, such as memos and letters, may be created only incidentally to the performance of other duties. Employees may create the works for marketing by the employer or for internal noncommercial use only.

It should also be remembered that provisions dealing with ownership of copyright in employment situations must stay within the ambit of copyright. They should therefore provide a clear statement of the law without interfering with labour law or contract law within the provinces.

The two extreme positions are either to leave employers full ownership of all works created by employees in the course of employment, without even the special protection currently given contributors to certain periodicals, or to grant full ownership to the employee/author.

Employers argue that if someone is hired to create a particular type of work with market value, for example a newspaper story, a dictionary, a technical drawing or a computer program, the salary is intended as payment for that type of creation. Good journalists, editors, draftsmen or programmers will be able to demand a higher salary. If the employee is paid solely for the purpose of creating works and in addition to this salary still has full copyright in the works created, employers argue that they would have to pay twice for the same thing. Conversely, if the employee creates works incidental to the performance of some other function, such as letters to customers or clients, inter-office memos, marginal notes or comments, employers argue that leaving the copyright with the employee simply creates the possibility for harassment or unnecessary litigation. Even if the work has no commercial value, a disgruntled former employee could cause the employer severe inconvenience by refusing to assign copyright.

Employers also maintain that requiring a written "agreement to the contrary" or assignment would create unnecessary paperwork and that the documentation would theoretically have to be retained for 50 years after the death of the employee. That is particularly difficult where the work is the product of many employees who may have worked on it at different times. Some manufacturers and distributors of copyright works created by others (printers, record pressers) argue that they would prefer the assumption of employer-first ownership to avoid worrying about being sued for infringement by an employee.

Employees argue, however, that the basic principles of copyright law should be stated in as general a fashion as possible. Allowing employers to be first owners creates a very large exception to the basic principle that authors are the first owners. They also note that even though they may be receiving a salary to create a particular work or type of work, that work may attain a value or be used in a fashion completely beyond the expectations of both parties. There are several ways in which this can happen. The work may be used by the employer in precisely the way expected but it may have much greater popularity than anticipated. (That value may be due to the fame of the creator as opposed to anything done by the employer.) It may be sold to another company and used in either the same or a different medium or exploited in a different fashion. Finally, changes in technology (e.g. the recent advent of videocassettes and disks) may allow the work to be exploited in a completely new fashion beyond either party's anticipation at the time the work was created. Employee/creators see such new utilizations as windfall gains to their employers. They are particularly

sensitive when a new or unanticipated profitable use of their work occurs after their employment has terminated. Employee/creators argue that because of the great variety of ways in which different works can be dealt with and exploited, they should be allowed to negotiate each type of use.

Employee/creators are also concerned when employers use their ownership of copyright to suppress exploitation of a work. If employers are already marketing a work of a certain type, they may feel that marketing a second work would create unnecessary competition and reduce profit margins. Employee/creators argue that if their employer refuses to exploit a work when given a reasonable opportunity (or refuses to exploit it in as broad a fashion as they feel appropriate) they should have the opportunity of exploiting it personally. They assert that the purpose of copyright is contravened if it is used to prevent the dissemination of works. It should be noted that West Germany grants authors the right to seek a compulsory licence against copyright owners where the owners refuse to publish a work.

As mentioned above, the two positions stated initially are the extremes. There are many intermediary positions, including that in the current Copyright Act, which grants a limited protection to contributors to certain periodicals. For discussion purposes two such alternatives are given below. These would be "subject to any agreement to the contrary;" the parties would always be free to strike agreements best suited to their own particular requirements.

- Copyright remains with the author, but the employer has a licence to use the work in the course of his or her business.
- Copyright vests with the employer and he or she may publish or otherwise deal with the work, but the employee/author may restrain any assignment or licence of the copyright to a third party.

#### Crown Employees

The issue also arises whether employees of the Crown should be treated in the same fashion as private sector employees. Section 11 of the Copyright Act grants to the Crown the first ownership of works created by or under its direction or control.

Without prejudice to any rights or privileges of the Crown, where any work is,

or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and appropriate in such case shall continue for a period of fifty years from the date of the first publication of the work.

That provision includes much more than simply works created by employees.

Crown employees work in a wide variety of situations. Some are employed in government departments and their creative efforts are financed entirely by the public purse; others work for Crown corporations that may be entirely self-supporting or profit-making and may be in direct competition with private sector companies. The rights of the Crown and the employees could be defined differently in those different situations.

The most basic situation, and doubtless the one considered when section 11 was drafted, is that of employees of government departments and similar bodies. Two related factors in that situation are relevant to copyright protection and the dissemination of works.

- The creation and publication of works is financed by the public purse.
- Generally speaking, the decision to produce or publish a work is not based upon market demand, i.e. whether the sales of the works are sufficient to cover costs. Nor is there any profit motive and works are often distributed for free or below cost.

There is also the principle that works created by the government should be disseminated as widely as possible. That principle is expressed very forcefully in the American Copyright Act, in which no copyright is granted for government works: they may be copied by anyone.

It is arguable that even if first ownership remains with the author, the Crown should have a licence to publish, distribute, translate or otherwise use or adapt the work. It would be unfortunate if an individual author could prevent the publication or other use of a work that had been created at public expense.

At the other extreme are profit-oriented Crown corporations, where the motivation for the creation and publication of works may be identical to that in the private sector. It is arguable that such corporations should be treated in exactly the same way as private sector employers. It could be considered unfair for employees of a self-supporting Crown corporation to have fewer rights with respect to their works (lacking any agreement to the contrary) than employees in a competing private sector firm.

In between these two extremes of government-related operations are a wide range of federal and provincial boards, commissions, agencies and corporations that operate under a variety of circumstances, from total subsidization to full cost recovery and in varying degrees of competition with the private sector. If the government decides that there should be a different treatment of employees within traditional government departments and similar bodies and employees of profit-making Crown corporations, choosing the precise dividing line may pose problems; any such boundary will necessarily be somewhat arbitrary.



## NOTES













